United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

United States Court of Appeals

For the District of Columbia.

927

No. 18,112.

ESTATE OF RODOLFO OGARRIO (DAGUERRE), Deceased, FRANK RASHAP, Ancillary Administrator,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the United States.

FRANK RASHAP,
Ancillary Administrator,
Appearing Pro Se,
74 Trinity Place,
New York, N. Y.

THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1963

Index.

Docket Entries.

TAX COURT OF THE UNITED STATES

GENERAL DOCKET

Docket No. 89850

Estate of Rodolfo Ogarrio (Daguerre), Deceased, FRANK RASHAP, Ancillary Administrator, 894 Green Place, Woodmere, Long Island, New York,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Filings and Proceedings

1960

Nov.	7	Petition filed: fee paid 11/7/60
Dec.	6	Answer by resp. filed
Dec.	6	Request by resp. for trial at New York, N. Y.

1962

Aug.	23	Notice of trial at New York, N. Y. November 26, 1962
Nov.	30	Trial at New York, New York by Judge Raum. Stipulation of facts filed. Original briefs due—January 14, 1963 Reply briefs due—February 4, 1963 Under Submission—Judge Raum
Dec.	17	Transcript of Trial Nov. 30, 1962 rec'd

Docket Entries

1963		
Jan.	9	Motion by petr. to extend time to January 29, 1963 to file original Brief and to February 19, 1963 to file Reply Brief.
Jan.	23	Brief for Petitioner filed
Jan.	29	Brief for Respondent filed
Feb.	15	Reply Brief for Petr. filed (No reply brief to be filed by resp. per Judge Raum's office)
May	7	Findings of fact and opinion filed, Judge Raum. Decision will be entered for the respondent.
		Under Submission—Judge Raum
May	8	Decision entered, Judge Raum.
		Appellate Proceedings
Aug.	5	Stipulation as to venue for review of the decision of the Tax Court filed.
Aug.	5	Petition for review by USCA District of Columbia Circuit filed by petr.
Aug.	4	Proof of service filed.
Aug.	12	Designation of contents of record on review with affidavit of service attached filed by Petr.

Petition.

TAX COURT OF THE UNITED STATES.

Estate of Rodolfo Ogarrio (Daguerre), Deceased, FRANK RASHAP, Ancillary Administrator,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

The above named Petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated September 6, 1960, and for a re-determination of the claim of the Petitioner for a refund of estate taxes in the sum of $1,179.98, and as a basis of its proceeding alleges as follows:

1. The Petitioner, Frank Rashap, resides at 894 Green Place, Woodmere, Long Island, N. Y. and is the duly appointed and acting Ancillary Administrator of the Estate of Rodolfo Ogarrio (Daguerre) in the State of New York, by virtue of the issuance to him of Ancillary Letters of Administration by the Surrogate's Court, New York County, on June 12, 1957, which said Letters are still in full force and effect.

2. The Notice of Deficiency, a copy of which is attached hereto and marked Exhibit "A", was mailed to the Petitioner on September 6, 1960.

3. The deficiency as determined by the Commissioner is in U. S. estate taxes, in effect at the time of the death of the decedent on January 17, 1957, in the amount of $73,244.57. That the amount in controversy is the

said sum of $73,244.57 together with the sum of $1,179.98 claimed by Petitioner as a refund for overpayment of estate taxes on Petitioner's original return.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) In determining the value of the property of the decedent which was subject to U. S. estate taxes the Commissioner erroneously determined that the value, at the time of decedent's death on January 17, 1957, of the decedent's right, under the terms of the Incentive Compensation Agreement Plan of The Texas Company, to receive 376 shares of the common stock of The Texas Company, par value $25.00 per share, which right had accrued on January 1, 1957, was the sum of $21,949.00 and not the sum of $15,286.75, as returned by the Petitioner on the decedent's amended non-resident alien estate tax return.

(b) In determining the value of the decedent's right to receive 376 shares of the common stock of The Texas Company, par value $25.00 per share, under the Incentive Compensation Agreement Plan of The Texas Company, which right accrued on January 1, 1957, the Commissioner erroneously determined that Petitioner was not entitled to deduct from the aggregate fair market value of 376 shares of common stock of The Texas Company on January 17, 1957 the sum of $6,662.25 which The Texas Company required to be paid to it, for U. S. withholding tax under Section 1441 of the U. S. Internal Revenue Code, before it would deliver said number of shares to the decedent.

(c) In determining the value of the property of the decedent which was subject to U. S. estate taxes at the time of his death, the Commissioner

erroneously determined that there must be included in decedent's gross estate the sum of $4007.40 due to the decedent from The Texas Company, a domestic corporation, under the provisions of the Incentive Compensation Agreement Plan of The Texas Company, as at the date of his death, which represented dividends paid on its stock held for his account in that plan during the year 1956, instead of the sum of $2805.18.

(d) In determining the value of the decedent's right to receive the said sum of $4007.40 under the Incentive Compensation Agreement Plan of The Texas Company, which right accrued on January 1, 1957, the Commissioner erroneously failed to determine that the Petitioner was entitled to deduct from the said $4007.40 the sum of $1202.22 which The Texas Company required to be paid to it, for U. S. withholding tax under Section 1441 of the U. S. Internal Revenue Code, before it would deliver said sum of $4007.40 to the decedent.

(e) In determining the value of the property of the decedent which was subject to U. S. estate taxes at the time of his death, the Commissioner erroneously determined that there must be included in decedent's gross estate the sum of $235,599.94 due from Bache & Co. to the decedent at the time of his death and representing the proceeds of sale of 3936 shares of common stock of The Texas Company which the decedent had sold on the New York Stock Exchange, through his said stockbrokers, Bache & Co., on January 10, 1957.

(f) In determining the value of the property of the decedent which was subject to U. S. estate taxes at the time of his death, the Commissioner

erroneously failed to determine that the sum of $235,599.54 representing the proceeds of the sale of 3936 shares of stock of The Texas Company, belonging to the decedent, which Bache & Co., New York stockbrokers, had sold for the account of the decedent on January 10, 1957 on the New York Stock Exchange, was, at the time of decedent's death, held by Bache & Co. for the account of the decedent in Bache & Co. accounts in various banks in the City of New York and therefore was not includible in his gross estate under Section 2105(b) of the Internal Revenue Code.

(g) The Commissioner erroneously failed to determine that the Petitioner had made an overpayment of estate taxes in the sum of $1179.98 on his original estate tax return by reason of the fact that Petitioner had, on that return, erroneously set forth the value of the 376 shares of common stock of The Texas Company to which decedent became entitled on January 1, 1957 under the Incentive Compensation Agreement Plan of The Texas Company at a value of $21,949.00 at the time of decedent's death instead of a value of $15,286.75.

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

The decedent at the time of his death was a national of the Republic of Mexico and had his permanent and only residence in that country. He had been, for many years prior to his retirement from business in December 1950, an officer of The Texas Company. Upon his retirement he transferred his residence to Mexico and resided in that country continuously thereafter up to the time of his death in Mexico City, Mexico, on January 17, 1957. At the time of his death the decedent was

a national of Mexico having reacquired his Mexican nationality and citizenship in 1954. The decedent was not engaged in business in the United States at the time of his death.

By reason of his long employment by The Texas Company (i. e. prior to December 1950), the decedent was one of the beneficiaries of that company's employee retirement plan which was known as the Incentive Compensation Agreement Plan of The Texas Company. Pursuant to the terms of that plan, the decedent became entitled, on January 1, 1957, to receive from The Texas Company 376 shares of the common stock of The Texas Company (par value $25 per share) and the sum of $4007.40 representing dividends paid during the year 1956 on stock of The Texas Company and held by it for the account of the decedent under the plan. However, by reason of the fact that the decedent was a non-resident alien not engaged in business in the United States, The Texas Company refused to deliver either said 376 shares of common stock or said sum of $4007.40 until it received 30% of the value thereof which it was required to withhold pursuant to Section 1441 of the Internal Revenue Code.

The decedent died in Mexico City at 8 A. M. (Mexico City time) on January 17, 1957. As Mexico City time is the same as Central Standard time in the United States, the decedent's death was at 9 A. M. Eastern Standard Time as then in effect in New York City. At 9:45 A. M. on that day (i. e. shortly after the death of the decedent) the law firm of Hardin, Hess & Eder delivered to The Texas Company their check in the sum of $7,864.47 to the order of the Internal Revenue Service, which had been certified by that firm's bank shortly after 9 A. M. that morning, with instructions to deliver that check to the Internal Revenue Service in payment of the 30% withholding tax applicable to the said 376 shares

of The Texas Company and said sum of $4007.40. The funds covered by said certified check were the funds of said firm of Hardin, Hess & Eder and were only repaid to it by the decedent's estate after his death. On that same day, and after receipt of said certified check in the sum of $7864.47, The Texas Company delivered 376 shares of its common stock to Bache & Co. for the account of the decedent and delivered its check in the sum of $4007.40 to The Hanover Bank for the account of the decedent. That at the time the said certified check in the sum of $7864.47 was delivered by Hardin, Hess & Eder to The Texas Company and the said check in the sum of $4007.40 and said 376 shares of common stock of The Texas Company were delivered by The Texas Company to The Hanover Bank and Bache & Co., respectively, neither Hardin, Hess & Eder, nor The Texas Company nor The Hanover Bank, nor Bache & Co. had any knowledge of or notice of the fact that the decedent had died in Mexico City earlier on that day.

On Thursday, January 10, 1957, the decedent owned 3936 shares of the common stock of The Texas Company, the certificates for said shares being held by Bache & Co., stockbrokers in New York City, for the account of the decedent. On that day Bache & Co., who were members of the New York Stock Exchange and of the Stock Clearing Corporation, sold all of said shares on the New York Stock Exchange for the decedent's account in accordance with instructions they had received from the decedent. Under the rules of the Stock Exchange, said transaction of sale was required to be settled or cleared on the fourth business day thereafter, namely on January 16, 1957. On January 16, 1957 said transaction was settled and cleared by Bache & Co. through the Stock Clearing Corporation and as a result thereof, Bache & Co. held for the account of the decedent the proceeds of that sale, namely the sum of $235,599.54 in their bank ac-

counts in New York City at the close of business on January 16, 1957, and the books of account of Bache & Co. at the close of business on that day so stated.

At the close of business on that day—January 16, 1957—Bache & Co. had bank accounts in several of the leading banks in New York City which accounts totalled far in excess of the sum of $235,599.54 after giving effect to all checks previously drawn and issued by Bache & Co. on their various bank accounts, including all of the checks issued by Bache & Co. on that very day.

On January 17, 1957, and some time subsequent to the death of the decedent which had occurred at 8 A. M., Mexico City time, that morning, Bache & Co., not knowing of the death of the decedent, paid the said sum of $235,599.54 from one of their New York City bank accounts to The Hanover Bank for deposit to the account of the decedent.

WHEREFORE, Petitioner prays that this Court may hear the case and determine that no deficiency is due from the Petitioner for estate taxes on the estate of the decedent, Rodolfo Ogarrio (Daguerre), deceased, and that the Petitioner is entitled to a refund of estate taxes in the amount of $1,179.98.

MONROE COLLENBURG
Counsel for Petitioner
74 Trinity Place
New York 6, N. Y.

(Verified by Frank Rashap, October 31, 1960.)

Exhibit A, Annexed to Petition.

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Office of Regional Commissioner

90 Church Street

New York 7, N. Y.

(Seal of Internal
Revenue Service)

In Reply Refer to
Ap:NY:MW:BC

Sep 6 1960

Estate of Rodolfo Ogarrio (Daguerre)
Frank Rashap, Ancillary Administrator
74 Trinity Place
New York 6, New York

Dear Mr. Rashap:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of the estate tax liability of the above-named estate discloses a deficiency of $73,244.57. The attached statement shows the computation of the deficiency.

IF YOU AGREE to this determination, please sign the enclosed agreement form and return it promptly to this office. An addressed envelope is enclosed for this purpose. The signing and filing of this agreement will permit an early assessment of the deficiency or deficiencies and will limit the accumulation of interest.

IF YOU DO NOT AGREE, and do not sign and return the enclosed form, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of ninety days from the date of this letter, unless within that time you contest this determination in the Tax

Exhibit A, Annexed to Petition

Court of the United States by filing a petition with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

DANA LATHAM
Commissioner
By ELLIS L. ZACKER
Associate Chief, Appellate Division

Enclosures:

Statement
Agreement form
Addressed envelope

STATEMENT

Estate of Rodolfo Ogarrio (Daguerre)
Frank Rashap, Ancillary Administrator
74 Trinity Place
New York 6, New York

Date of Death: January 17, 1957

ESTATE TAX

Liability	Assessed	Deficiency
$90,936.99	$17,692.42	$73,244.57

In making this determination of the federal estate tax liability of the above-named estate, careful consideration has been given to the report of examination dated September 15, 1959; and to your claim for refund filed on July 30, 1958.

Exhibit A, Annexed to Petition

The issue raised in your claim for refund wherein you allege that the aggregate fair market value on the critical date of 376 shares of The Texas Company common stock, par value $25.00, is $15,286.75 has been carefully considered. After weighing all of the pertinent factors it is determined that the aggregate fair market value on the date of decedent's death of the stock in issue is $21,949.00 which has been properly reported on the Estate Tax Return as originally filed.

If a petition is filed with the Tax Court of the United States against the determination of the Commissioner, the issue raised in your claim for refund should be made a part of the petition filed with the Court. If a petition is not filed, a statutory notice of disallowance will be forwarded to you in accordance with the provisions of Section 6532 (a) (1) of the Internal Revenue Code of 1954.

ADJUSTMENT TO THE TAXABLE ESTATE

Taxable estate as disclosed by original return	$ 89,258.65
Addition:	
(a) Gross estate in the United States	239,606.94
Taxable estate as corrected	$328,865.59

EXPLANATION OF ADJUSTMENT

(a) It is determined that the proceeds of sale of 3,936 shares of common stock of The Texas Company in the amount of $235,599.54 due to the decedent from Bache & Co., New York City, his stockbrokers, at the time of his death, are includible in his gross estate under the provisions of sections 2103 and 2104 of the Internal Revenue Code of 1954 and the Estate Tax Regulations applicable thereto.

Exhibit A, Annexed to Petition

It is determined that the sum of $4,007.40 due to the decedent from The Texas Company, a domestic corporation, under the provisions of its Incentive Compensation Agreement Plan, as at the date of his death, which represents dividends paid on its stock held for his account in that plan during the year 1956, is includible in his gross estate under the provisions of sections 2103 and 2104 of the Internal Revenue Code of 1954 and the Estate Tax Regulations applicable thereto.

COMPUTATION OF ESTATE TAX

Taxable estate as corrected	$328,865.59
Net estate tax payable	$ 90,936.99
Tax previously assessed—DT 7135	17,692.42
Deficiency in estate tax	$ 73,244.57

Answer.

TAX COURT OF THE UNITED STATES.

Estate of Rodolfo Ogarrio (Daguerre), Deceased, Frank Rashap, Ancillary Administrator,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

Docket No. 89850

The Respondent for answer to the petition filed in the above-entitled case admits and denies as follows:

1, 2, 3. Admits the allegations of paragraphs 1, 2 and 3 of the petition.

4. (a) to (g). Denies the allegations of error contained in subparagraphs (a) to (g), inclusive, of paragraph 4 of the petition.

5. 1st Unnumbered Paragraph. Admits that the decedent at the time of his death was a national of the Republic of Mexico and that decedent was not engaged in business in the United States at the time of his death. Denies the remaining allegations of the first unnumbered subparagraph of paragraph 5 of the petition for lack of information sufficient to form a belief as to the truth or correctness thereof.

2nd Unnumbered Paragraph. Admits that by reason of his long employment by The Texas Company (i. e. prior to December 1950) the decedent was one of the beneficiaries of that company's employee retirement plan which was known as the Incentive Compensation Agree-

ment Plan of The Texas Company. Pursuant to the terms of that plan, the decedent became entitled, on January 1, 1957, to receive from The Texas Company 376 shares of the common stock of The Texas Company (par value $25 per share) and the sum of $4007.40 representing dividends paid during the year 1956 on stock of The Texas Company and held by it for the account of the decedent under the plan. Denies the remaining allegations of the second unnumbered subparagraph of paragraph 5 of the petition for lack of information sufficient to form a belief as to the truth or correctness thereof.

3rd Unnumbered Paragraph. Admits that decedent died in Mexico City on January 17, 1957. Denies the remaining allegations of the third unnumbered subparagraph of paragraph 5 of the petition for lack of information sufficient to form a belief as to the truth or correctness thereof.

4th Unnumbered Paragraph. Admits that on Thursday, January 10, 1957, the decedent owned 3936 shares of the common stock of The Texas Company, the certificates for said shares being held by Bache & Co., stockbrokers in New York City, for the account of the decedent. On that day Bache & Co., who were members of the New York Stock Exchange and of the Stock Clearing Corporation, sold all of said shares on the New York Stock Exchange for the decedent's account in accordance with instructions they had received from the decedent. Denies the remaining allegations of the fourth unnumbered subparagraph of paragraph 5 of the petition.

5th Unnumbered Paragraph. Denies the allegations of the fifth unnumbered subparagraph of paragraph 5 of the petition for lack of information sufficient to form a belief as to the truth or correctness thereof.

Answer

6th Unnumbered Paragraph. Denies the allegations of the sixth unnumbered subparagraph of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied and the determination of the respondent be in all things approved.

(Sgd) HART H. SPIEGEL
WM
Chief Counsel
Internal Revenue Service

Of Counsel:

Wm. V. Crosswhite
Regional Counsel
Philip Shurman
Special Attorney

Internal Revenue Service
90 Church Street
New York 7, New York

Stipulation of Facts.

TAX COURT OF THE UNITED STATES.

Estate of Rodolfo Ogarrio (Daguerre), Deceased, FRANK RASHAP, Ancillary Administrator,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 89850

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part thereof; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. The Non-Resident Alien Estate Tax Return of the decedent, a copy of which is annexed hereto and marked Exhibit 1-A, was filed with the Internal Revenue Service on October 17, 1957.

2. Petitioner is the Ancillary Administrator of the Estate of Rodolfo Ogarrio (Daguerre) deceased in the State of New York and was so appointed by the Surrogate's Court, New York County on June 12, 1957.

3. Rodolfo Ogarrio (Daguerre), also known as Rodolfo Ogarrio, Petitioner's decedent, died in the city of Mexico, D. F., Mexico, on January 17, 1957 at about 8 o'clock A. M., Mexico City time which was equivalent to Central Standard Time in the United States.

Stipulation of Facts.

4. That 8 o'clock A. M. in Mexico City, i. e. Mexican time, on January 17, 1957 was equivalent to 9 o'clock A. M. Eastern Standard Time in the City of New York on that day.

5. At the time of his death, and for a number of years prior thereto, Rodolfo Ogarrio was a non-resident alien, not a citizen of the United States and was not, at the time of his death, engaged in business in the United States.

6. Rodolfo Ogarrio (Daguerre) had been an employee of The Texas Company (now known as Texaco, Inc.), a Delaware corporation, for many years up to the time of his retirement from that company in the month of December 1950.

7. The firm of Bache & Co., with its principal offices at 36 Wall Street, New York City, were, in January 1957 and for many years prior thereto, engaged in business as stockbrokers and were members of the New York Stock Exchange and of the Stock Clearing Corporation in the City of New York.

8. At the time of his death and for many months prior thereto, petitioner's decedent, Rodolfo Ogarrio, was a customer of the firm of Bache & Co. and maintained, at their Chrysler branch, a securities account bearing No. 72-20367-1 with said firm of the type known as a "cash account." Such a "cash account" with a stock brokerage house is one where the customer agrees that any purchases made by the broker for his account will be paid for in full by the customer in cash upon receipt of the securities by the broker and any sales made by the broker for the customer's account shall be paid for in full in cash to the broker for the customer's account, at the time of delivery by the broker of the customer's securities. Rodolfo Ogarrio and Bache & Co. executed

a Customer's Agreement on or about May 4, 1953, a copy of which is attached hereto and marked Exhibit 2-B, which Agreement remained in full force and effect up to the time of the death of Rodolfo Ogarrio.

9. Prior to January 10, 1957 Bache & Co. had received for the account of Rodolfo Ogarrio certificates for 3936 shares of The Texas Company. Said certificates were in the name of Rodolfo Ogarrio and were held by Bache & Co. in safekeeping for him pending instructions from Rodolfo Ogarrio regarding sale or other disposition of said stock. Said certificates were kept by Bache & Co., together with whatever other certificates of The Texas Company that Bache & Co. held from time to time, for other customers.

10. That on January 10, 1957 Bache & Co. sold for the account of Rodolfo Ogarrio on the New York Stock Exchange, pursuant to the rules of the said Exchange, the aforementioned 3936 shares of stock of The Texas Company for the total net amount (after deduction of broker's commissions and stock transfer taxes) of $235,599.54.

11. Pursuant to the rules of the New York Stock Exchange, the sale made on January 10, 1957 was to be completed by delivery and payment on January 16, 1957 through a clearing house known as Stock Clearing Corporation.

12. On January 16, 1957 Bache & Co., through the Stock Clearing Corporation, delivered for the account of Rodolfo Ogarrio 3936 shares of The Texas Company to the purchaser to whom they had been sold by Rodolfo Ogarrio, through Bache & Co. as his brokers, on January 10, 1957. On the same day, January 16, 1957, Bache & Co. received, through the Stock Clearing Corporation, payment for said sale of the 3936 shares of The Texas Company so delivered for his account which, after the

deduction of broker's commissions and stock transfer taxes, amounted to the sum of $235,599.54. On January 16, 1957, as a result of offsetting transactions and as a result of securities delivered and securities received, Bache & Co. owed on balance to Stock Clearing Corporation the sum of $255,969.72 and actually delivered to Stock Clearing Corporation its check in that amount drawn on Guaranty Trust Company.

13. As a result of the transaction referred to in paragraph 12 above Rodolfo Ogarrio, at the time of his death, no longer owned the 3936 shares of The Texas Company referred to in paragraph 9 above.

14. At the close of business on January 16, 1957 the regular books of account of Bache & Co. showed that the sum of $235,599.54 had been credited to the account of Rodolfo Ogarrio on that day as a result of the transaction referred to in paragraph 12 above.

15. On January 17, 1957, and subsequent to 9 A. M. (E.S.T.), on that day, Bache & Co. delivered to the Hanover Bank in New York City its check No. 24412 in the sum of $257,350.53, drawn on its checking account in the Hanover Bank, payable to the order of the Hanover Bank for the account of Rodolfo Ogarrio. Said check included the sum of $235,599.54 received by Bache & Co. on January 16, 1957 through the Stock Clearing Corporation and referred to in paragraph 11 above.

16. On January 1, 1957, pursuant to the terms of an employees' retirement plan of The Texas Company, the decedent, as a former employee of that company, became entitled to receive from The Texas Company and The Texas Company was obligated to deliver and pay to the decedent 376 shares of the common stock of The Texas Company (par value $25 per share) and the sum of $4007.40 in cash. By reason of the fact that the decedent was a non-resident alien The Texas Company

was required by applicable provisions of The Internal Revenue Code of 1954 to deduct and withhold a tax of 30% of the value of the aforementioned 376 shares of The Texas Company common stock and 30% of the aforementioned sum of $4007.40. The amount, in U. S. dollars, so required to be deducted and withheld by The Texas Company out of the 376 shares was the sum of $6662.25 and the amount so required to be deducted and withheld by The Texas Company out of the sum of $4007.40 was the sum of $1202.22.

17. The market value of 376 shares of The Texas Company ($25 par value) on the date of decedent's death, January 17, 1957, was $21,949.00, which was the value of the said 376 shares set forth in the decedent's Non-Resident Estate Tax Return, marked Exhibit 1-A. On July 30, 1958 the petitioner filed a document marked Amended Non-Resident Alien Estate Tax Return with the Director of International Operations of the Internal Revenue Service. In said document marked Amended Return the value of said 376 shares of The Texas Company was set forth as $15,286.75 and it was stated in said document that the sum of $15,286.75 represented the value of the said 376 shares at the date of decedent's death, to wit, $21,949.00, less the sum of $6662.25 required to be deducted and withheld by The Texas Company.

18. At the time of the decedent's death on January 17, 1957, no part of the aforementioned 376 shares of The Texas Company nor any part of the aforementioned sum of $4007.40 had been delivered or paid over by The Texas Company to or for the account of the decedent, and no part of the U. S. income taxes required to be deducted

and withheld by The Texas Company with respect to said 376 shares of The Texas Company and with respect to said $4007.40 had been paid to the Internal Revenue Service by The Texas Company or by the decedent or by any others on his behalf.

19. Petitioner concedes that there is includible in the taxable estate 70% of the sum of $4007.40 referred to in paragraph 16 above, namely $2805.18.

s/ MONROE COLLENBURG
Attorney for Petitioner
s/ CRANE C. HAUSER,
Counsel
Internal Revenue Service
Attorney for Respondent

Exhibit 1-A, Annexed to Stipulation of Facts.

Tax Return.

(See opposite page.) ☞

Form 706NA
(Rev. May 1955)
U. S. TREASURY DEPARTMENT
Internal Revenue Service

UNITED STATES

NONRESIDENT ALIEN ESTATE TAX RETURN

(For use only by estates of decedents dying after August 16, 1954)

Do not write in this space

The return must under certain circumstances be filed on Form 706 instead of this form. For details see section 2 of instructions.

Decedent's name: **Rodolfo Ogarrio (Daguerre)**

Date of death: **January 17, 1957**

Residence (domicile) at time of death: **Sierra Fria 728, Lomas de Chapultepec, Mexico, D.F., Mexico**

Citizenship (nationality) at time of death: **Mexican**

Business or occupation: **Retired**

Names of persons filing return	Designations (Executor, administrator, beneficiary, custodian, trustee)	Mailing address (Number, street, city, zone, State)
Frank Rashap	Ancillary Administrator	74 Trinity Place, New York 6, N.Y.

1b. Julio Ogarrio (Daguerre), Administrator appointed by the
First Civil Court of Mexico, Federal District
V. Carranza 946
Mexico, D. F., Mexico

d. Debts owing by persons resident in the United States or by United States corporations?	☒ YES	☐ NO
e. Other property situated in the United States?	☐ YES	☒ NO
3. Was the decedent engaged in business in the United States at date of death?	☐ YES	☒ NO
4. Did the decedent and spouse own, at the time of death, any **community property** situated in the United States?	☐ YES	☒ NO
5. Did the decedent, at the time of his death, own any property situated in the United States as a **joint tenant** or as a **tenant by the entirety** with right of survivorship?	☐ YES	☒ NO

time of the decedent's death?	☐ YES	☒ NO
8a. Did the decedent, at the time of his death, possess a general power of appointment over property any part of which was situated in the United States?	☐ YES	☒ NO
b. Or, at any time, exercise or release such a power?	☐ YES	☒ NO

(NOTE.—A general power of appointment means any power of appointment exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate, and includes the right of a beneficiary to appropriate or consume the principal of a trust. See Estate Tax Regulations for complete definition.)

Computation of tax (see sections 10 and 11 of instructions)

1. Taxable estate (item 8, schedule B)	$ 89,258.65
2. Gross tax on taxable estate (use "Table for computing estate tax")	17,692.42
3. Credit for State death taxes	
4. Net estate tax payable (item 2 minus item 3)	$ 17,692.42

DECLARATION

We/I declare under the penalties of perjury that this return including the additional sheets attached, if any, has been examined by us/me, and to the best of our/my knowledge and belief, is a true, correct, and complete return. It is understood that a complete return requires the listing herein of all the property constituting the part of the decedent's gross estate (as defined by the statute) situated in the United States.

Date _____ _____

Date _____ _____

Date Oct 11 1957 FRANK RASHAP
(Signatures of person(s) filing return)

HARDIN HESS & EDEN
(Signature of person preparing return)

Date Oct 11, 1957 74 Trinity Place, New York 6, N.Y.
(Address of person preparing return)

16—80708-6

Rider to Schedule "A"

1.	1,128 shares of common stock of the Texas Company par value $25., listed on New York Stock Exchange - value at death $58-3/8 per share. (These shares are held by the Texas Company under its Incentive Compensation Agreement Plan. The stock will be received by the estate in three equal instalments of 376 shares each in January of 1958, 1959 and 1960	$65,847.00
2.	376 shares of Common stock of the Texas Company, par value $25., listed on New York Stock Exchange. Value at death 58-3/8 per share	21,949.00
3.	Annuity payment under the Texas Company annuity contract due January 1, 1957 for which a check had been issued by the Travelers Insurance Company but had not been deposited at the time of the decedent's death	1,682.37
4.	The sum of $1,419.00 credited to the decedent by the Texas Company under its Incentive Compensation Agreement but not payable at time of decedent's death	1,419.00
5.	Check from Robert Fisher to order of decedent in sum of	361.28
	Total	$91,258.65

Note:
See Addenda 1 and 2 as to explanation of assets coming within Paragraph 4(f) of the instructions attached hereto.

SCHEDULE A—Gross Estate in the United States (see sections 3, 4, 5, 6, and 7 of instructions)

Is election hereby made to have the gross estate of this decedent valued in accordance with values as of a date or dates subsequent to the decedent's death as authorized by section 2032 of the Internal Revenue Code? ☐ YES NO ☒ (This election cannot be exercised unless it is shown upon the return and the return is timely filed. The information in columns (c) and (d) should not be furnished unless the reply to this question is "Yes.")

Item No. (a)	Description of property (b)	Subsequent valuation date (c)	Alternate value (d)	Value at date of death (e)
	See Attached Schedule		$	$
	(If more space is needed, attach additional sheets of same size)			
	Total from Rider A	Total	$	$ 91,258.65

SCHEDULE B—Taxable Estate (see sections 8 and 9 of instructions)

If adequate proof in support of items 2 and 4 is not submitted, deduction at item 4 will not be allowed. If adequate proof in support of item 2 is not submitted, deduction at item 6 will be limited to $2,000. See section 9 of instructions for circumstances under which "prorated specific exemption" will be allowed. If prorated specific exemption is claimed under Japanese treaty, the numerator of the fraction set forth in item 6 is the value of the property situated in the United States and the subject of tax by both the United States and Japan.

1. Gross estate in the United States (total, schedule A)	$ 91,258.65
2. Gross estate outside the United States, not including real property	— —
3. Total gross estate wherever situated (item 1 plus item 2)	$ — —
4. Amount of funeral expenses, administration expenses, debts of decedent, mortgages and liens, and losses during administration (attach itemized schedule)	— —
5. Deduction of expenses, claims, etc. (that proportion of item 4 that item 1 bears to item 3)	— —
6. Specific exemption of $2,000 (in estates qualifying for "prorated specific exemption," use $2,000 or $\frac{\text{item 1}}{\text{item 3}} \times \$60{,}000$, whichever is the greater)	2,000.00
7. Total deductions (item 5 plus item 6)	$ 2,000.00
8. Taxable estate (item 1 minus item 7)	$ 89,258.65

GENERAL INFORMATION

a. Time and place for filing return.—The return is due 15 months after the date of the decedent's death. The return must be filed with the district director of internal revenue in whose district the gross estate in the United States was situated; or, if such gross estate was situated in more than one district, the return must be filed with the District Director of Internal Revenue, Customhouse, New York N. Y., or with such other district director as the Commissioner of Internal Revenue may designate.

b. Payment of tax.—The tax is due 15 months after the date of the decedent's death, and must be paid within such period unless an extension of time for payment thereof has been granted by the District Director. Check or money order in payment of the tax should be made payable to "District Director, I. R. S."

c. Penalties.—Severe penalties are provided by law for willful failure to make and file a return and for willful attempt to evade or defeat payment of tax.

TABLE FOR COMPUTING ESTATE TAX

(For rates of tax on taxable estates exceeding $500,000, see the Estate Tax Regulations.)

(A) Taxable estate equaling—	(B) Taxable estate not exceeding—	Tax on amount in column (A)	Rate of tax on excess over amount in column (A)
			Percent
	$5,000		3
$5,000	10,000	$150	7
10,000	20,000	500	11
20,000	30,000	1,600	14
30,000	40,000	3,000	18
40,000	50,000	4,800	22
50,000	60,000	7,000	25
60,000	100,000	9,500	28
100,000	250,000	20,700	30
250,000	500,000	65,700	32

GPO 16—80798-4

Exhibit 1-A, Annexed to Stipulation of Facts

Addendum 1,

Explanation to Paragraph 4(f) of Instructions.

The decedent, a non-resident alien not engaged in trade or business within the United States, maintained a securities account with Bache & Co., 36 Wall Street, New York 5, New York, and on January 1, 1957 this account contained the following securities:

1000 shs. Sinclair Oil Corp.
3936 " The Texas Company.
1000 " American Cyanamid Co.
1000 " American Radiator & SS.
2000 " Celanese Corp.
2100 " Standard Oil of Calif. and a cash balance of $5,407.98.

On January 10, 1957, pursuant to the instructions of the decedent, Bache & Co. sold the above securities, and on January 11th issued its check drawn on the Hanover Bank in the sum of $292,136.65 which sum was credited to the account in the name of the decedent, or Julio Ogarrio, or survivor, in the Hanover Bank. This check comprised the proceeds from the sale of all of the above securities including the cash balance of $5,407.98 except the 3936 shares of stock of the Texas Company. Prior to the decedent's death on January 17, 1957, the major part of this money had been withdrawn from the said bank account and was out of the country at the time of the decedent's death. The balance on deposit at the Hanover Bank at the opening of business on the day of the decedent's death was $16,652.54. This sum should be clearly exempt from the estate tax pursuant to Sec. 2105 (b).

The 3936 shares of stock of the Texas Company were also sold by Bache & Company for the account of the

decedent on January 10, 1957. The proceeds from the sale of the shares of stock of the Texas Company in the sum of $235,599.54 were credited to the account of the decedent on Bache & Company's ledgers on January 16, 1957. The New York Stock Exchange through which this stock was sold provides that the settlement date for a sale made through it shall be on the fourth business day after the sale. This is the reason that the account of the decedent with Bache & Company was not credited with the proceeds until January 16th. Therefore, at the time of the decedent's death, at 8 A. M. on January 17, 1957, there was credited on Bache & Company's ledgers to the account of the decedent the sum of $235,599.54. At that time there were sufficient funds on deposit in New York banks to the account of Bache & Company to cover this credit entry. It is, therefore, the opinion of your Ancillary Administrator that the said sum of $235,599.54 credited to the account of the decedent with Bache & Company at the time of his death, reflected moneys on deposit with a person carrying on the banking business by or for the account of the decedent (a non-resident alien not engaged in trade or business within the United States) and therefore not property within the United States. (Internal Revenue Code of 1954 Sec. 2105[b]).

Estate of Lesley D. Worthington, 18 T. C. 797—Dec. 19, 116;
Estate of M. S. Bradford-Martin, 18 T. C. 544—Dec. 19, 045;
Estate of I. de Guelbriant, 14 T. C. 611—Dec. 17, 600;
Estate of Anna Floto de Eissengarthen, 10 T. C. 1277—Dec. 16, 479;
Estate of E. H. Davey, 10 T. C. 515—Dec. 16, 305.

On January 17, 1957, Bache & Co. being unaware that decedent had died early in the morning of that day, issued

its check in the sum of $257,330.53, which represented the proceeds from the sale of the 3936 shares of stock of the Texas Company, plus the sum of $21,751.26 for 376 shares of the Texas Company stock delivered to Bache & Company on the day decedent died but after his death. (The value of the 376 shares of Texas Company stock at the time of the decedent's death has been included as part of decedent's gross estate located within the U. S. and not the proceeds received from the sale of said securities.) The Hanover Bank, where Bache & Company deposited said check, was also unaware of the death of decedent and credited the proceeds of said check to his account with the bank.

Addendum 2,

Explanation to Paragraph 4(f) of Instructions.

The decedent prior to his retirement and return to Mexico in December, 1950 was a Vice President of the Texas Company.

The Texas Company had an Incentive Compensation Agreement Plan whereby officers and employees of the company were credited with units of stock predicated on their years of employment with the company and the rate of compensation which they received. Upon retirement of the officer or employee the number of shares corresponding to the units credited to the officer or employee were set aside under the Plan to the account of the officer or employee. The number of shares thus set aside were paid to the employee in 10 equal annual installments starting with the first year after his retirement. Any dividends received on the stock were credited to the account of the officer or employee on the Incentive Compensation Agreement Plan books and the money from the dividends was deposited in a Texas Company bank account.

Exhibit 1-A, Annexed to Stipulation of Facts

On January 1, 1957, there was due to the decedent the 7th installment under this Plan. This installment was comprised of 376 shares of stock (these shares have been reported on Rider A and referred to in Addendum 1) and the sum of $4,007.40, which sum represented dividends that had been received on the stock held under the Plan. The only reason that the shares and the sum of $4,007.40 had not been paid over to the decedent before his death was that since the decedent was a nonresident alien not engaged in trade or business within the United States, there was a tax due at the rate of 30% which was required to be collected by the disbursing agent, in this case, the Texas Company.

At the time of decedent's death early in the morning of January 17, 1957, there was therefore a credit to the account of the decedent under the Incentive Compensation Plan in the said sum of $4,007.40, which represented monies that were paid out as dividends on stock of the Texas Company held under the Incentive Compensation Plan for the account of the decedent and deposited with a bank in the name of the Texas Company and there was at the time of the decedent's death sufficient funds in a bank account in the name of the Texas Company to cover said credit. It is therefore the opinion of your ancillary administrator that said sum of $4,007.40 credited to the account of the decedent under the Incentive Compensation Agreement Plan at the time of his death reflected money on deposit with a bank carrying on the banking business by or for the account of the decedent (a nonresident alien not engaged in trade or business within the United States) and therefore not property within the United States. (Internal Revenue Code of 1954, Section 2105 b).

Exhibit 2-B, Annexed to Stipulation of Facts

Estate of Lesley D. Worthington, 18 T. C. 797—Dec. 19, 116;
Estate of M. S. Bradford-Martin, 18 T. C. 544—Dec. 19, 045;
Estate of I. de Guelbriant, 14 T. C. 611—Dec. 17, 600;
Estate of Anna Floto de Eissengarthen, 10 T. C. 1277—Dec. 16, 479;
Estate of E. H. Davey, 10 T. C. 515—Dec. 16, 305.

On January 17, 1957, upon the receipt by the Texas Company of a check to cover the tax due on the shares and the monies on deposit, the Texas Company deposited its check drawn on The Hanover Bank in the sum of $4,007.40 to the account in the name of the decedent, or Julio Ogarrio or survivor, in The Hanover Bank, The Texas Company and the Hanover Bank both being unaware at the time this deposit was made that the decedent was already dead.

Exhibit 2-B. Annexed to Stipulation of Facts.

Customers Agreement.

(See opposite page.) ☞

Ex 2B

Form MGN-1C-10M 3-49

BACHE & CO.
30 WALL STREET
NEW YORK

INFORMATION FORM

BRANCH K 2036
NUMBER 88870

CUSTOMER'S NAME: Rodolfo Ogarrio

RESIDENCE ADDRESS: Sierra Fria 725 - Mexico D.F. - Mexico
RESIDENCE PHONE: 20-18-71

BUSINESS ADDRESS: —
BUSINESS PHONE: —

ADDRESS FOR NOTICES: As above

EMPLOYER'S NAME: Own.
EMPLOYER'S ADDRESS:

NATURE OF BUSINESS: Consultant

POSITION HELD:

BANK REFERENCE: Irving Trust - Empire Bldg Branch
OTHER REFERENCE:

INTRODUCED BY: Irving Trust
DATE: 11/5/59

CITIZEN
CUSTOMER'S SIGNATURE: R. Ogarrio

REMARKS BY BRANCH MANAGER:

BRANCH MANAGER'S SIGNATURE

ACCOUNT APPROVED BY PARTNER

DATE

PARTNER'S SIGNATURE

Printed in U.S.A.

BACHE & Co.

CUSTOMER'S AGREEMENT

To be signed by
All Customers

Gentlemen:

1. I am of full age, and no one except myself has any interest in my account. Whenever the first person singular is used herein, it shall include the plural, corporate, fiduciary, and any other signers. If this Agreement is signed by more than one individual, our liabilities and obligations hereunder shall be joint and several.

2. I promise to pay you upon demand, the purchase price of any property purchased for me, at my request, whether or not you have actually received, or tendered to me, said property. Upon nonpayment, after such demand, you are authorized in your discretion to sell any or all my securities in your possession or carried for my account, or close in whole or in part any short position or future commitment, such sale or closing may be made without any further demand and without notice to me of time and place of sale. Such sale may be made on any brokers board or at public or private sale, and at any such sale you may purchase all or any of the securities sold free of any equity of redemption. My accounts and this agreement and all your rights hereunder may be transferred by you to any successor firm or firms that takes over or continues your business. My orders shall be binding on my personal representatives and may be executed notwithstanding my death or incapacity.

3. All transactions for my account may be executed either by you or your agents and shall be subject to the constitution, rules, regulations, customs and usages then in effect of the Exchange or Board or market and its clearing house, if any, where the transactions are executed by you or your agents, and to the customs and usages then in effect of brokers on such Exchange, Board or market, and to the present and future provisions of the Securities Exchange Act of 1934 and of all other laws applicable thereto, and to the rules and regulations of administrative bodies that may have jurisdiction thereunder. You may register any securities carried for my account in your name or in the name of your nominee. You shall at no time be required to deliver to me the identical property purchased, held or carried for my account, but only property of like kind and amount. You may, in your discretion transfer to my name any securities held for my account and ship them to me by ordinary mail.

4. Reports of the execution of orders, and statements of my account from you, or from any of your branches, or offices, or from any of your correspondents, shall be conclusive upon me if not objected to by me in writing, the former within five days and the latter within ten days, after transmittal to me by mail or otherwise. Communications may be sent to me at any address given hereon, unless such address shall have been changed by me by written communication actually received by you, and all communications so addressed whether by mail, telegraph, messenger or otherwise, shall be deemed given to me personally whether actually received or not and shall be deemed to have been given on the date on which the same shall have been sent by you. You may, for my account (s), accept orders and follow instructions given by any broker through whose courtesy my account (s) with you is (are) carried.

5. Whenever I fail to make immediate delivery to you in proper form for delivery by you of any property sold by you at my direction, I authorize you to borrow any property necessary to make such delivery, or to buy in such property, and I agree to repay you any loss or expense that you may sustain by reason of such borrowing or purchase or of your inability to borrow or purchase the property so sold.

6. Any partner of your firm or any of your employees, or any employee of any correspondent of yours may communicate with me at any time at my home, place of business or elsewhere, by telephone or otherwise, in connection with my account or any transaction.

7. I agree that, in giving orders to sell, all "short" sale orders will be designated as "short", and all "long" sale orders will be designated as "long", and that the designation of a sell order as "long" is a representation on my part that I own the security, and, if the security is not in your possession, that it is then impracticable to deliver the security to you forthwith and that I will deliver it as soon as is possible.

8. This agreement and its enforcement shall be governed by the laws of the State of New York. Any controversy between you or any of your partners or employees and me arising out of, or relating to this contract, or the breach thereof, or arising out of transactions with you shall be submitted to arbitration in accordance with the rules, then obtaining, of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or the American Arbitration Association, or the Board of Arbitration of the New York Stock Exchange, as I may elect. If I do not make such election by registered mail addressed to you at your main office within five (5) days after receipt of notification from you requesting such election, then you may make such election. Any arbitration hereunder shall be before at least three (3) arbitrators, and the award of the arbitrators, or a majority of them, shall be final, and judgment upon the award rendered may be entered in any Court, State or Federal, having jurisdiction. I agree that notices of, and in, any such arbitration may be sent to me by mail and waive personal service thereof.

9. I have retained, in my possession, a duplicate of this agreement.

Date:..... Customer's Signature X.....(L. S.)

WHITE COPY MUST BE SENT TO MAIN OFFICE — BUFF COPY TO BE RETAINED BY CUSTOMER — PINK COPY TO BE FILED IN BRANCH OFFICE

Transcript.

BEFORE THE TAX COURT OF THE UNITED STATES.

Estate of Rodolfo Ogarrio (Daguerre), Dec'd., FRANK RASHAP, Ancillary Administrator,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 89850.

Courtroom No. 1
Room 820, News Building
220 East 42nd Street
New York, New York
November 30, 1962

Met, pursuant to notice at 10:25 o'clock a. m.

Before:

Honorable Arnold Raum,
Judge.

Appearances:

Monroe Collenburg, Esq., appearing on behalf of the Petitioner.

Philip Shurman, Esq., and Lionel Savadove, Esq., appearing on behalf of the Respondent.

Transcript

(3) *Proceedings.*

The Clerk: Docket No. 89850. Estate of Rudolfo Ogarrio, et cetera.

Gentlemen, your appearances for the record.

Mr. Collenburg: Monroe Collenburg for the petitioner.

Mr. Savadove: Lionel Savadove and Philip Shurman for respondent.

Mr. Collenburg: May it please the Court, before making an opening statement, we have submitted a stipulation of facts, but there was one fact that I wanted stipulated at the time we entered the stipulation that the government was not prepared to stipulate at that time.

Now, since then we have received some letters from Bache & Co. and as I understand from Mr. Savadove, he is perfectly agreeable that these letters be added to our stipulation and accepted by the Court as correct statements of the facts contained in these three letters from Bache & Co., two of them of this week and one a prior letter.

The Court: You may submit them to the Court as exhibits and I will take your oral stipulation that the facts contained in these exhibits may be taken as true.

Mr. Collenburg: The first exhibit is a letter from Bache & Co. to Messrs. Hardin, Hess & Eder of 74 Trinity Place, signed by William A. DeMarrais. This has been marked (4) Exhibit 3C.

The Court: Received.

(The document referred to was marked Joint Exhibit 3C and was received in evidence.)

Mr. Collenburg: Then there is a letter from Bache & Co. to Mr. Crosswhite, Regional Counsel, dated November 29, 1962 and signed by Dominick Dorata, Regional Attorney.

(The document referred to was marked Joint Exhibit 4D and was received in evidence.)

Mr. Collenburg: Third is a letter from Bache & Co. to myself dated November 29, 1962, also signed by Dominick Dorata, Regional Attorney, marked as Exhibit 5E.

The Court: Received.

(The document referred to was marked Joint Exhibit 5E and was received in evidence.)

Mr. Collenburg: One other matter, your Honor. Due to a misunderstanding on the part of myself with the Texas Company and also evidently with government counsel as to the way in which a pension plan was set up by the Texas Company, of which the deceased in this case, Mr. Ogarrio, was one of the beneficiaries, I stated in the petition certain words that are not correct at all. I was misled into thinking that under the pension plan when he retired certain stock of the Texas Company was held by the Texas Company and later on, periodically, handed over to him every year, a certain percentage of (5) it, together with the dividends on the stock. Now, that was not correct.

All that the Texas Company did under their pension plan was agree that every year after his retirement they would deliver over to him a certain number of shares of the stock and that they would also deliver over to him a sum of money which would be equivalent to the dividends that was paid on the Texas Company stock under which the company was obligated to deliver to him each year.

In other words, it wasn't dividends received by the Texas Company from the stock, but the same equivalent amount. Now, where I had stated in the petition here on page 3 at the bottom, "This sum of money, which represents dividends paid on its stock held on account for his plan for the year 1956" is not correct. It was an equivalent amount. So if those words are stricken from the petition, the petition will be correct.

Transcript

Now, the same phrase appears on page 6, the bottom, and running onto the top of page 7, the first quote I have just mentioned was in our allegation of the errors made by the Commissioner. This is in our statements of fact. There we say that the sum representing dividends paid during the year 1956 on stock of the Texas Company and held for the account of the deceased—those words should be stricken out and the statement in the petition would be correct.

(6) Now, the government in its answer has also stipulated as to the same words, your Honor, in their answer, so if those words are stricken out of there, the same statement, both the petition and answer will correctly state the facts.

Mr. Savadove: The government has no objection to striking these phrases from the petition and in so far as a denial was made in the government's answer, that would be amended as well. It should be treated as amended.

The Court: Well, I will not order any change in the pleadings. I will let the record stand as made with the pleadings filed as originally filed, together with counsel's explanation here and now.

Mr. Savadove: Your Honor, I might add that the correct state of facts is reflected in the stipulation of facts anyway.

The Court: Well, that would certainly supersede the pleadings.

Mr. Collenburg: Well, I was wondering about that because there was an inconsistency because we have pleaded something which they have admitted.

The Court: Well, I will take your present statement as an amplification of what appears in the record, that and as an explanation of the inconsistency between the pleadings and stipulation, and I will take my facts from the stipulation rather than from the pleadings.

Opening by Mr. Collenburg

(7) Mr. Collenburg: Thank you, your Honor.

We had expected to have a witness, but in view of these letters we have submitted, we will not have a witness, your Honor, and I offer the stipulation of facts as our only evidence, together with the letters you have just received in the case.

The Court: And they are, also, in effect, part of your stipulated facts?

Mr. Collenburg: Correct, your Honor.

The Court: Very well.

Mr. Savadove: Your Honor, the government has one witness. It also has a brief opening statement, if the Court will indulge us.

The Court: Very well.

Mr. Collenburg: May I make an opening statement, your Honor?

The Court: As you wish.

Mr. Collenburg: Perhaps it would help.

Opening Statement on Behalf of the Petitioner by Mr. Collenburg:

Mr. Collenburg: The deceased, Rodolfo Ogarrio, was a born Mexican and came to this country many years ago and became an employee of the Texas Company. He worked here in New York, but he retired in 1950 and returned to Mexico where he lived the rest of his life. He died on January 17, 1957.

(8) At that time he had regained Mexican citizenship. He was a resident down there and not doing business in the United States. That has been stipulated and set forth in the pleadings, that he was a non-resident alien not doing business in the United States.

Now, some time prior to January of 1957 Bache & Co., the stock brokers here, were his stock brokers. They had received, either from him or some other people for

his account, 3,936 shares of the Texas Company stock, which was registered in his name. On January 10th, Bache & Co. sold that stock on the New York Stock Exchange for his account and the total sum of the sales, after deducting commissions and taxes and so forth, was $235,599.54.

Now, under the rules of the New York Stock Exchange that stock sold on January 10th of that year would be settled four business days thereafter, which was January 16th, because of the intervening Saturday and Sunday. On January 16th, Bache & Co. settled by delivery of the stock through the Stock Clearing Corp., which is the clearing house through which all transactions on the New York Stock Exchange are cleared by the brokers. Now, I presume your Honor understands how this clearing house operates.

Bache & Co. pay and receive on balance. In other words, through the clearing house they deliver whatever stocks they have. If they happen to have sold on the same day some stocks and had bought the same stocks, they would clear by (9) showing a credit and debit on their statement to the clearing house. They wouldn't deliver anything that was the exact same number. Then the total amount of their sales and their purchases of January 10th would be balanced out, and if they owed on it they would pay a check to the Stock Clearing Corporation, and if they were to receive something on balance, the Stock Clearing Company would give them a check.

Now, on that day Bache & Co. owed on balance. They owed an amount of $255,000, I believe it is, and that amount is set forth in the stipulation. So on that day in making their clearance with the Stock Clearing Corporation, they delivered a check for this large amount. At the end of that day their account with Rodolfo Ogarrio showed that this amount of the proceeds of that 3,936 shares had been credited to his account.

Now, Rodolfo Ogarrio's account with Bache & Co. was a cash account, not a margin account. That is defined in the stipulation, an account between the broker and customer in which the customer agrees to pay in cash in full when the broker buys stock for him and the broker agrees that when they sell any stock for the customer, they will receive cash in full for his account.

At the end of that day this sum was on the account, on his cash account in Bache & Co. The next day at 8 o'clock in the morning in Mexico City, which was equivalent to (10) 9 o'clock in New York City, Rodolfo Ogarrio died. At that time no one here knew that he was dead. Bache & Co. drew out, in accordance with instructions they had, from their account they had at the Hanover Bank the $235,000 and actually it is more because there were other sales, but included in the check they had handed over was this $235,000-odd for the sale of these shares, in a check payable to the Hanover Bank for the credit of Rodolfo Ogarrio who had a credit at that bank.

At the time that check was delivered, Rodolfo Ogarrio was already dead. Now, the problem with respect to this stock and the proceeds of it is as to whether that represented money on deposit in a bank in the United States by Rodolfo Ogarrio or held for his account at the time of his death. It is our position that it did.

The Court: Is it the government's position, as far as you understand—

Mr. Collenburg: That Bache & Co. owed the money to the deceased and that situation was not one that would be relieved of the estate tax under the statute.

Now, we have shown through the letters that Bache & Co. had substantial bank accounts in the city. One of the letters here will show that just in the City of New York these bank accounts totalled some $2,200,000 or $2,900,000 on what I would consider the three significant days—the day before the settlement was made, January

15th; the day of the (11) settlement, the 16th and on the 17th. On all those days, they had well over $2 million in their bank accounts here. Since this stock was Rodolfo Ogarrio's stock held in his name and sold for his account as a cash customer, that even though it comes through a stock clearance operation it was as though Bache & Co. had received a check and the next day handed it over to him, even though he was dead, and therefore that their bank account was for his account. That is the main issue in this case.

The Court: Which bank account?

Mr. Collenburg: A bank account, your Honor. I don't think it makes any difference which bank it is. In other words, on clearance they have received the proceeds of his stock. Therefore, the money in their bank becomes his money when they sell his stock and do it through a clearance operation because it is as if they had taken a check, and it doesn't make any difference what bank it was.

I am going to cite the *Worthington* case, your Honor, which is even more complicated about an intervening estate, where the broker had accounts in two leading banks and they didn't draw any distinction as to what bank it went into. It could be either of those banks. They had sold somebody else's property and held the proceeds in their bank. Now, whether it was actually traceable to a specific bank or not didn't appear to the Court in that case to make any difference whatever. (12) and I submit it shouldn't, because on a clearance operation, it is as if it went into a bank.

Now, whether you say it would depend on the bank out of which they drew it, that wouldn't matter. They drew it out of one of their banks, the Hanover Bank, the next day.

The Court: I suppose your position would require you to take the position that if Bache & Co. had gone

into bankruptcy prior to paying the money over to Mr. Ogarrio that Mr. Ogarrio would have an asset in the amount equivalent to the net sales price and that was his asset and not an asset of the bankrupt.

Mr. Collenburg: That is exactly our position, your Honor.

The Court: Well, I suppose if you can show that, you will have made substantial progress toward establishing your position.

Mr. Collenburg: Well, it is complicated by the fact that this was not the type of transaction where they just went down and got a check for the balance. It was a clearance operation. You can understand that Bache & Co., which does millions of dollars worth of business a day—

The Court: Well, I'm not sure. Perhaps you can enlighten me. I just wonder whether the clearing house operations simply complicate the situation. I wonder whether the basic question would exist regardless of the clearing (13) house operation. Suppose Bache & Co. had made but a single sale, namely Mr. Ogarrio's stock, and received payment from the purchaser rather than from the clearing house and had deposited the proceeds in one of Bache's bank accounts. To make it simpler, suppose Bache had a single bank account and deposited the proceeds in its own bank account and had not yet paid the money over to Mr. Ogarrio by the time that Mr. Ogarrio died. Isn't that your problem?

Mr. Collenburg: Surely, sir.

The Court: So that the clearing house operations merely add details that are not necessarily basic to the problem.

Mr. Collenburg: I agree with your Honor. It sort of throws a little mud in the water, you might say, to figure out the effect of having the clearing transaction of this sort, and where they have several bank accounts and not just one and—

Opening by Mr. Collenburg

The Court: Well, I take it it would be the government's position in the hypothetical case that I outlined that if Bache had sold Mr. Ogarrio's stock and received the proceeds from the purchaser, deposited those proceeds in its own bank account without any interposition of the clearing house that Bache would still be a debtor as far as Mr. Ogarrio was concerned, and it would not be a matter of consequence in reference to what Bache had done with these funds, whether (14) had put them in the strong box or deposited them in its own bank account or what.

Mr. Savadove: That would be our position, your Honor.

Mr. Collenburg: So basically, that's the problem, this question of a broker having the proceeds of your property, having received it, it's recognized as being in his bank account when he receives it through a clearing operation just as though he had actually received a check and put it there.

The Court: Of course, you have to go further and treat that bank account as if it was Mr. Ogarrio's bank account *pro tanto*, because if Bache & Co. put the proceeds in a strongbox there would be nothing in the statute to give you the exemption from the estate tax. It is on deposit with the bank—that fact that gives you the exemption you are claiming, so you have two hurdles to overcome. Treat the proceeds of the sale as belonging to Mr. Ogarrio before being paid over to him, and Bache's bank account being Mr. Ogarrio's bank account.

Mr. Collenburg: Or all of them as one, your Honor. Now, that's the first issue in the case. The second one involves a small amount of stock of this pension plan, of 357 shares. I believe it is—let me check that. 376 shares of the Texas Company stock was deliverable to Mr. Ogarrio on January 1st of that year, just a short time before he died. (15) and also the sum of $4,007.04, and that sum was the equivalent of the dividends paid by the Texas

Company during the preceding year on the number of shares of stock that Mr. Ogarrio would be entitled to in the future, not just the 376, but whatever was to come in the future.

Now, by reason of the fact that Mr. Ogarrio was a non-resident alien not doing business, the Texas Company was required by the income tax law here to deduct and withhold a tax of 30 percent. This was income to Mr. Ogarrio. At the time Mr. Ogarrio died no part of that tax had been paid over to the government and no part of the 376 shares, or $4,007 had been paid either by the Texas Company to the government, so that the situation was the same at the time of his death as it was on the day when this took place.

Now, it is our position that as far as the estate of Mr. Ogarrio in this country is concerned, the value of the 376 shares should be reduced by the 30 percent that was considered to be withheld by the Texas Company under the income tax law. Therefore, the only amount taxable, as far as the estate of Mr. Ogarrio is concerned, should be 70 percent of that value, and likewise, 70 percent of the $4.000.

Now, though we feel it has no legal effect or bearing here, the tax on that was paid by our firm at the request of Mr. Ogarrio the next day, after he had died, we not knowing he had died, and after that the Texas Company delivered the (16) stock and money to Mr. Ogarrio's account. Nobody knew he was dead at that time. We got a certified check the next day at 9 o'clock and nobody knew he was dead. At that time the Texas Company was still holding the $4.000. Now, as you will see from the stipulation of facts, they weren't holding stock for him, they were only obligated under the pension plan on a certain date to deliver stock. They could have gone into the market and bought 376 shares. It was that type of pension plan. That is our second situation.

Opening by Mr. Savadove

We feel only 70 percent of those amounts are taxable because of the terms of the Withholding Act which says that the person who has the control of this amount due to a non-resident alien not doing business must deduct and withhold from the property to be delivered over 30 percent, so it should be really regarded as if it had been deducted and paid to the government. The mere fact that it had not been paid yet shouldn't make any difference.

Opening Statement on Behalf of Respondent by Mr. Savadove:

Mr. Savadove: If it please the Court, Mr. Collenburg delineated the two issues rather well and I won't stay on either of them except to state the government's positions in these matters.

As to the 3936 shares of stock that were sold on January 10th, payment and delivery on January 16th, it is the (17) government's position that Bache & Co. merely owed a debt to the deceased at the time of his death at 9 a. m., eastern standard time, on January 17th. No moneys had been segregated or set aside for the deceased at that time and this was merely an open account on Bache's books. As the stipulation points out, at the time of death there was a credit balance payable to Rodolfo Ogarrio. We feel this could not be construed under the law as money on deposit by or on behalf of the deceased in a bank or banking institution.

This was money on deposit on Bache's behalf for Bache to use as it wished.

The second issue in the case involves only the amount includable in the gross estate because of the stock and these dividends in the amount of $4.007 and some odd cents that were payable to the deceased on the date of his death. It is the government's position that the value of

this stock and the amount of these dividends must be includable in the gross estate in gross without any deduction for withholding, which the Texas Company took care of. We feel this is similar to the reporting of income on an income tax return. Once income is taken in gross and any withholding tax which is deducted is simply a credit against this. However, the amount that was due on the date of death to Rodolfo Ogarrio was the amount which Texas Company had owed, which was a gross amount, subject possibly to a later withholding, which is irrelevant (18) to the amount includable in the gross estate. I should like to note to the Court that under the Code any income taxes payable by the deceased after his death are not properly deductions on the estate tax return. This is the very issue here, as to whether these income taxes, which were later paid, we presume, are deductible from the full value of the stock and these dividends that were due on January 17th.

The Court: But if income taxes had been paid before death, the amounts of those payments obviously wouldn't be included in the gross estate.

Mr. Savadove: But, your Honor, there were no income taxes paid in this case before death. This was presumably income on which the taxes were paid at a later date and a return filed at a later date. Of course, we don't have that before the Court in this case.

The Court: Had there been withholding in fact prior to the deceased's death?

Mr. Savadove: No, your Honor, and that is in the stipulation of fact.

Mr. Collenburg: Well, I am not sure about that, your Honor. I feel that the very fact that Texas Company did not turn anything over to him that became due on January 1st, and on January 17th they were still holding on to that, for that very reason, it was that they had to deduct and withhold. That's what the law says. The

person having control of such (19) property belonging to a non-resident alien must deduct 30 percent. If they had turned it over, that would be a different matter. We would be liable for the tax, but that was not turned over. The fact of the Texas Company holding on this this until the tax had been paid is our point.

Suppose the $4,000 had been large enough to take care of the tax on the whole business, they would have simply held that and turned over the stock, but it wasn't. The total tax was $7,000-odd on these two items, so they couldn't say they would hold on to the money and give over the stock.

Mr. Savadove: Your Honor, I would like to call, unless the Court has further questions about this, a witness. I call Mr. Dominick Dorata.

DOMINICK DORATA, was called as a witness on behalf of the respondent and, having been first duly sworn, testified as follows:

The Clerk: State your name and address for the record, please.

The Witness: Dominick Dorata, 89 Bay 26th Street, Brooklyn, New York.

Direct Examination by Mr. Savadove:

Q. Mr. Dorata, are you here in response to a subpoena served by the government on Bache & Co.? A. Yes.

(20) Q. Can you tell the Court your position at Bache & Co.? A. Regional attorney in the law department at Bache & Co., and in my position I have occasion to review and investigate various matters for the firm concerning litigation and otherwise, and as such, have opportunity to become familiar with all the records, basic records, of the firm, and I have been employed for five years with them.

Respondent's Witness, Dominick Dorata, Direct

Q. Because of various questions posed by both the petitioner and respondent, have you taken the opportunity to familiarize yourself with the file and documents and general facts of this stock transaction that we are dealing with today? A. Yes, I have.

Q. From your knowledge, Mr. Dorata, did the deceased have any special agreement with Bache relating to this transaction? By that I mean the sale of stock of 3936 shares on January 10, 1957, shares of the Texas Company. A. At your request I investigated this matter and found no record of any agreement except the basic cash agreement that we have with the deceased and that did not provide anything with respect to this transaction.

Q. This basic agreement, when was this entered into? A. At the time the account was opened.

Q. Do you know when that was? A. I have a copy of that here. No. I have the original (21) here.

The Court: Is this the agreement that is in evidence?

Mr. Savadove: Yes, your Honor. I believe that would show the date.

The Witness: May 5, 1953.

Q. Has that agreement been in continuing effect ever since? A. Yes. By its terms it is.

Q. What were the responsibilities of Bache & Co. in particular with respect to any sale of stock under this agreement for the deceased? A. To credit the account and—

Mr. Collenburg: Your Honor, I think the agreement speaks for itself.

Mr. Savadove: Your Honor, I think we are concerned directly with a tracing theory, and I think it is important to show what exactly was done in this particular sale of stock.

The Court: That wasn't your question, though.

Mr. Savadove: I will strike that question and rephrase it, your Honor.

Q. What were the responsibilities of Bache & Co. with respect to this particular sale of stock which took place on January 10, 1957, pursuant to the terms of the running (22) customer's agreement which you have stated was on file with Bache? A. The responsibilities and obligations were to, in the mechanics of the operation of the account, simply credit the account with the proceeds of the sale of the stock and so pay to Mr. Ogarrio these proceeds upon receiving instructions.

Q. Were there instructions received from Mr. Ogarrio in this case? A. Presumably. I don't know that in fact they were. It is my understanding that they must have been or we wouldn't have paid the money out.

Q. Are you saying, then, that instructions must have been received for payment from Mr. Ogarrio or you would not have paid the money as you did? A. That's right.

Q. What might you normally do had there been no instructions from Mr. Ogarrio as to payment of the funds?

Mr. Collenburg: I object, your Honor. I think that is irrelevant to this case, what they might have done.

The Court: He may ask him as to what the practice of the firm was.

Mr. Savadove: Indeed, your Honor, we think this point as to the practice of the firm is relevant in this case.

The Court: Unless the witness has not stated with (23) any degree of sureness that there were special instructions. I think he merely assumed there were instructions. The witness may answer.

The Witness: Absent either general or specific instructions the firm would simply hold the credit balance in the account and send out the statement monthly pending other instructions.

Q. Was there a trust agreement of any sort between Bache and the deceased with reference to this particular transaction? A. None on record.

Q. Was there a trust agreement between Bache & Co. and the deceased in general with respect to all transactions that might be handled by Bache? A. No, sir.

Q. Was there an agreement between Bache & Co. and the deceased for the segregation of the proceeds of this particular sale on January 10th? A. No, nothing whatsoever other than—no, none at all. The cash agreement covers the disposition of the funds and the like, the general operation of the account.

Q. Did Bache & Co. earmark any particular funds for payment to the deceased as a result of this sale? A. I am not sure I understand that entirely—"earmark."

Q. Well, set aside or segregate any moneys for payment (24) to the deceased once these moneys had been received through the clearing house procedures? A. Not until the check itself was drawn.

Q. Now, Mr. Dorata, it has been stipulated by the parties here that on January 17th, Bache & Co. drew its check on the Hanover Bank payable to the order of the Hanover Bank for the credit of the deceased who had an account in the Hanover Bank. Now, on January 17, 1957, could Bache & Co. have used that Hanover Bank account for any partnership purposes rather than pay their debt to the deceased? A. It could have, yes.

Q. Could Bache & Co. have drawn payment to the deceased on any bank other than Hanover on January 17th? A. Yes.

Q. To your knowledge was there any other procedure or method for payment to Mr. Ogarrio as a result of

this sale of stock on January 10th other than by a check drawn to his order by Bache & Co.? A. None to my knowledge.

The Court: I presume that Bache & Co. could have paid this amount of money out of any funds whatever, whether they be funds deposited in banks or coming from any other source.

The Witness: That's the usual practice, yes. It could come from any source. In fact, where there is a branch (25) office located outside the city they sometimes draw from that local branch office. Funds are at some point deposited in the particular bank account to cover the checks drawn.

Q. Now, Mr. Dorata, on January 16th, it has been stipulated and is a fact that Bache & Co. actually paid money over to the stock clearing corporation as a result of balancing all the transactions on that debt. It paid its own money out to Stock Clearing Corporation. Now, suppose on January 16th on the balance you had received money from the Stock Clearing Corporation. Would it have necessarily have drawn a check for payment to the deceased the next day on the same bank in which it deposited these proceeds which I have assumed were received from the Stock Clearing Corporation? A. No, it would not.

Q. One final question, Mr. Dorata. It has been stipulated by the parties that these Texas Company shares were held by Bache in safekeeping in Mr. Ogarrio's name. Now, according to the records, on January 16th, were the particular certificates of Texas Company that were delivered to the buyer of these 3936 shares which the deceased sold on January 10th, were the particular certificates in his name the ones delivered by Bache & Co. on that day? A. This I don't know for a fact. I had not been asked this in advance to examine the records on,

but since there was a payment on balance through the Stock Clearing Corporation, (26) it is reasonable to assume that they would not necessarily be the same certificates nor all of the certificates since a stock as active as the Texas Company, we would have had also purchasers, so there would have been a net figure that could easily have been different than the number of shares sold for Mr. Ogarrio's account.

Q. If the only sale were 3936 shares, the only activity in Texas Company involving Bache on that day were this sale of 3936 shares of Texas Company, would the certificates delivered necessarily be those in Mr. Ogarrio's name? A. Well, as long as they are in his name the practice is to deliver those, but unfortunately that is violated—that is to say, the firm does not have to deliver those shares and many times does not. We many times register those shares in the name of Bache & Co., having delivered stock to the buyer, since it is what is known as a street certificate and is readily negotiable.

The Court: Shares in an equivalent amount, you mean?
The Witness: Yes, sir.

Mr. Savadove: No further questions, your Honor. Excuse me, I think I have one more, if the Court will give me a moment.

By Mr. Savadove:

Q. If cash were available on January 16, 1957, or (27) prior thereto, could Bache & Co. have paid the deceased in cash for the proceeds of this sale? A. You mean if he were present at one of the offices of Bache & Co.?

Q. Presumably. A. Well, we would never have. The practice is to draw a check and assist him in cashing it, but we would always draw a check. That's the usual practice, so that it could be properly charged to the account.

Mr. Savadove: That is all, your Honor.

Respondent's Witness, Dominick Dorata, Cross

Cross Examination by Mr. Collenburg:

Q. Mr. Dorata, you mentioned that not necessarily would shares have been delivered on the settlement date to Stock Clearance Corporation. Do you mean by that that if on the settlement if Bache & Co. has sold 100 shares of stock for one customer and has also purchased 100 shares of the same stock for another customer they would more or less set the one against the other and wouldn't deliver and get back? Is that what you mean? A. Yes, that's exactly what I mean.

Mr. Collenburg: That is all I have.

Mr. Savadove: Your Honor, I wonder if the Court would entertain a motion by the respondent in this case for judgment from the bench at this time. I think both parties (28) have gone inadvertently to a good deal of legal argument. I, for one, would be prepared to go further if the Court were interested at this time.

The Court: I will consult counsel at the bench off the record.

(Discussion off the record.)

The Court: After consulting at the bench with the government, I would like to inquire of the government and petitioner whether they have anything further to present this morning.

Mr. Collenburg: The petitioner rests.

Mr. Savadove: Respondent rests.

The Court: Then in accordance with discussions that I have had at the bench with both counsel, I am fixing the time for opening briefs in 45 days and reply briefs 20 days thereafter.

(Whereupon, at 11:20 a. m., the trial of the above-entitled matter was concluded.)

Joint Exhibit 3-C.

BACHE & CO.

FOUNDED 1879

36 Wall St.,

New York 5, N. Y.

Cashier's Department

February 10,
Our 79th Year.
1958.

Messrs. Hardin, Hess & Eder
Attorneys-at-Law
74 Trinity Place
New York 6, N. Y.

Att: Mr. Monroe Collenburg,

Gentlemen:

Referring to our letter of January 30, 1958 concerning a check issued by us on January 17, 1957 by the debit of the account #72-20367 of the late Rodolfo Ogarrio, Sierra Fria 725, Mexico D. F., Mexico, in the amount of $257,250.53, as requested, we herewith confirm that at the close of business January 16, 1957, after giving effect to all checks drawn by us on that day including the check issued to the order of Stock Clearing Corporation for $255,969.72, our bank balances exceeded by far the payment made on January 17, 1957, as indicated above, by the debit of the late Mr. Ogarrio's account.

Very truly yours,

BACHE & CO.
By WILLIAM A. DEMARRAIS
Cashier

W.A.DeM:fte

Joint Exhibit 4-D.

BACHE & CO.

FOUNDED 1879

36 Wall Street

New York 5, N. Y.

November 29, 1962

Wm. V. Crosswhite, Esq.
Regional Counsel
United States Treasury Department
30 Church Street
New York 7, New York

Re: Estate of Rudolfo Ogarrio
Docket No. 89850

Dear Mr. Crosswhite:

This is with reference to your letter of November 20, 1962.

We wish to advise you that at the close of business January 16, 1957, Bache & Co. had sufficient funds on deposit in all its banks to pay all checks issued on January 16, 1957, and prior thereto, including the check drawn to the order of Rudolfo Ogarrio, dated January 17, 1957, in the sum of $257,250.53.

Nevertheless, on January 16, 1957, we did not have sufficient funds on deposit to pay all credit balances outstanding in customers' accounts, had all of our customers made demand on that date for immediate payment. This is in keeping with the governing Federal and New York Stock Exchange regulations that permit the firm to have debts, including customers' balances, totaling up to twenty times the firm's capital.

Very truly yours,

DOMINICK J. DORATA
Regional Attorney

DJD:jm

Joint Exhibit 5-E.

BACHE & CO.

36 Wall Street

New York

Law Department

November 29, 1962

Monroe Collenburg, Esq.
Hardin, Hess & Eder
74 Trinity Place
New York 6, New York

Re: Rodolfo Ogarrio

Dear Mr. Collenburg:

In accordance with your request, we wish to advise you that we had on deposit in our banks in the City of New York the following sums of money on the indicated dates:

1. January 15, 1957—$2,259,671.58
2. January 16, 1957—$2,290,153.42
3. January 17, 1957—$2,852,140.95.

Very truly yours,

(Sgd.) DOMINICK J. DORATA
Regional Attorney

DJD: jm

Decision.

TAX COURT OF THE UNITED STATES

WASHINGTON

Estate of Rodolfo Ogarrio (Daguerre), Deceased, FRANK RASHAP, Ancillary Administrator,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 89850

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed May 7, 1963, it is

ORDERED AND DECIDED: That there is a deficiency in estate tax in the amount of $73,244.57.

Enter:

(Signed) ARNOLD RAUM
Judge.

Entered May 8, 1963

40 T. C. No. 29

TAX COURT OF THE UNITED STATES

Estate of Rodolfo Ogarrio (Daguerre), Deceased, FRANK RASHAP, Ancillary Administrator,

Petitioner.

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 89850. Filed May 7, 1963.

1. Decedent was a nonresident alien not engaged in business in the United States. Prior to his death his stockbroker in New York had credited his account with the proceeds from stock sold for the decedent, and this amount was owing to decedent at the time of his death. *Held*, the money thus owed to decedent was not excludable from his gross estate as "bank deposits". Section 2105(b), I. R. C. 1954. The mere fact that the brokerage firm had bank accounts of its own was not sufficient to justify treating them as reflecting "moneys deposited * * * by or for" the decedent in a bank.

2. Shares of stock and cash were due to decedent at the time of his death from his former employer pursuant to the terms of an employees' retirement plan; no Federal income tax had yet been withheld by the employer with respect to the stock and cash owed to decedent. *Held*, the value of the stock and cash were includable in decedent's gross estate without diminution on account of the income tax required to be withheld on these items before they could be paid out.

Monroe Collenburg, Esq., for the petitioner.

Decision

Lionel Savadove, Esq., and *Philip Shurman, Esq.*, for the respondent.

The Commissioner determined a deficiency in estate tax in respect of a nonresident alien in the amount of $73,244.57. The questions for decision are: (1) whether the proceeds of the sale of securities owed to the decedent by his stockbrokers at the time of his death qualify for exclusion from his gross estate as "moneys deposited * * * by or for" decedent under Section 2105 of the Internal Revenue Code of 1954; and (2) whether certain stock and money owed to him by an American corporation are includable in full in his gross estate without diminution on account of the 30 percent withholding for income taxes required by Section 1441.

Findings of Fact.

A stipulation of facts, as supplemented by exhibits stipulated by the parties, is incorporated herein by reference.

Petitioner is the estate of Rodolfo Ogarrio (Daguerre), who died in Mexico City on January 17, 1957, at about 8:00 a. m., Mexico City time, equivalent to 9:00 a. m., Eastern Standard Time.

The decedent had been an employee of The Texas Company (now known as Texaco, Inc.), a Delaware corporation, for many years prior to his retirement in December 1950. At the time of his death, and for a number of years prior thereto, he was a non-resident alien, not a citizen of the United States and was not, at the time of his death, engaged in business in the United States.

At the time of his death and for many months prior thereto, the decedent was a customer of and had a "cash account" with Bache & Co. (hereinafter referred to as Bache), a large brokerage house with principal offices in New York City. Bache had membership in the New York Stock Exchange and the Stock Clearing Corporation in

New York City. A "cash account" with a stock brokerage house is one where the customer agrees that any purchases made by the broker for his account will be paid for in full by the customer in cash upon receipt of the securities by the broker and any sales made by the broker for the customer's account will be paid for in full in cash to the broker for the customer's account, at the time of delivery by the broker of the customer's securities.

Prior to January 10, 1957, Bache had received 3,936 shares of The Texas Company for the decedent's account. The certificates were in his name and were held by Bache in safekeeping for him pending instructions from him regarding sale or other disposition of the stock. These certificates were kept by Bache together with whatever other certificates of The Texas Company that Bache held, from time to time, for other customers.

On January 10, 1957, Bache sold for the decedent's account the foregoing 3,936 shares of The Texas Company on the New York Stock Exchange, pursuant to the rules of the Exchange, for the total net amount of $235,599.54 (after deductions for broker's commissions and stock transfer taxes). In accordance with the foregoing rules, the sale was to be completed by delivery and payment on January 16, 1957, through a clearing house known as Stock Clearing Corporation, referred to above.

On January 16, 1957, Bache, through Stock Clearing Corporation, delivered for the decedent's account 3,936 shares of The Texas Company to the purchaser to whom they had been sold on January 10, 1957. On the same day, January 16, 1957, Bache received, through Stock Clearing Corporation, payment in the net amount of $235,599.54 after commissions and stock transfer taxes. On January 16, 1957, as a result of offsetting transactions and as a result of securities delivered and securities received, Bache owed on balance to Stock Clearing Corpora-

tion the sum of $255,969.72 and actually delivered to Stock Clearing Corporation its check in that amount drawn on Guaranty Trust Company. As a result of this transaction the decedent, at the time of his death, no longer owned the 3,936 shares of The Texas Company. At the close of business on January 16, 1957, the regular books of account of Bache showed that $235,599.54 had been credited to the decedent's account on that day as a consequence of the foregoing transaction.

On January 17, 1957, and subsequent to 9:00 a. m. Eastern Standard Time, Bache delivered to the Hanover Bank in New York City a check in the amount of $257,350.53 drawn on its checking account in the Hanover Bank and payable to the order of the Hanover Bank for the account of decedent. This check included the sum of $235,599.54 received by Bache on January 16, 1957, through the Stock Clearing Corporation.

Apart from the agreement establishing the decedent's "cash account" with Bache, there was no other agreement between them. Bache was under no obligation to, by agreement or otherwise, nor did it in fact, segregate any funds for decedent which it had received through the clearing house procedures, prior to paying such funds over to or on behalf of the decedent.

On January 17, 1957, Bache could have used its Hanover Bank account for any partnership purpose rather than pay its debt to decedent; and it could have made payment to decedent by drawing on its accounts in at least several other banks. Also, Bache could have paid decedent out of any funds owned or controlled by it, regardless of whether such funds were on deposit in any bank.

Bache had no fiduciary relationship to the decedent in respect of the proceeds of sale. Its responsibilities were to credit decedent's account with the proceeds and to pay him that amount upon receiving instructions from him.

Absent such instructions, Bache would hold the credit balance in the account and send out a statement monthly pending instructions.

At the close of business on January 16, 1957, Bache had sufficient funds on deposit in various banks to pay all checks issued on January 16, 1957, and prior thereto, including the check drawn to the order of decedent, dated January 17, 1957, in the sum of $257,350.53. On the indicated dates Bache had on deposit in various banks in New York City the following amounts of money:

January 15, 1957	$2,259,671.58
January 16, 1957	2,290,153.42
January 17, 1957	2,852,140.95

However, on January 16, 1957, Bache did not have sufficient funds on deposit to pay all credit balances outstanding in customers' accounts had all of its customers made demand on that date for immediate payment. The lack of sufficient funds in this connection was in keeping with governing regulations which permitted Bache to have debts, including customers' balances, totaling up to 20 times its capital.

On January 1, 1957, pursuant to the terms of an employees' retirement plan of The Texas Company, decedent, as a former employee of that company, became entitled to receive 376 shares of the common stock of The Texas Company and the sum of $4,007.40 in cash. Because decedent was a non-resident alien, The Texas Company, pursuant to Section 1441 of the Internal Revenue Code of 1954, was required to deduct and withhold a tax of 30 percent of the value of the aforementioned stock and money before the stock and money could be turned over to decedent. The market value of the stock on the date of decedent's death was $21,949. The amount, in United States dollars, required to be deducted and with-

Decision

held out of the stock was $6,662.25, and the amount so required to be deducted and withheld out of the sum of $4,007.40 was $1,202.22.

At the time of decedent's death, on January 17, 1957, no part of the 376 shares of stock and no part of the sum of $4,007.40 had been delivered or paid over by The Texas Company to or for the account of decedent, and no part of the United States income taxes required to be deducted and withheld had been paid to the Internal Revenue Service by The Texas Company or by decedent or by any others on his behalf.

Respondent included in decedent's taxable estate the sums of $21,949 and $4,007.40. Petitioner filed an Amended Nonresident Alien Estate Tax return and stated that the value of the 376 shares at the date of decedent's death was $15,286.75, being $21,949 minus $6,662.25, the sum required to be deducted and withheld by The Texas Company.

Opinion.

RAUM, *Judge:* 1. *Whether proceeds of sale of securities qualified as "bank deposits" under Section 2105.* Rodolfo Ogarrio had already died when Bache & Co., on January 17, 1957, delivered its check to the Hanover Bank for his account. Had that check been deposited in his account prior to his death, say on January 16, 1957, when the sale of the securities had been completed, there would be no problem here, because the amount on deposit in the decedent's account at the Hanover Bank would not be subject to our estate tax. Although a nonresident alien's gross estate is determined by reference to his property "situated in the United States" (Section 2103, Internal Revenue Code of 1954), the Code explicitly excludes therefrom "any moneys deposited with any person carrying on the banking business, by or for

a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death" (Section 2105). Accordingly, since Ogarrio was a nonresident alien not engaged in business in this country, any funds on deposit in his bank account at the time of his death would have been excluded from his taxable estate.

Petitioner insists, however, that the proceeds of the sale of The Texas Company stock are nevertheless excludable as "bank deposits" under Section 2105. We hold otherwise.

It is true, of course, that Bache was indebted to the decedent at the moment of his death in an amount which included the proceeds of that sale. But Bache is not a bank, nor does petitioner contend that it is. Petitioner's position appears to be that Bache itself had large amounts on deposit in various banks, that such deposits comprehended the proceeds of sale of the decedent's stock, and that the amount in controversy was in fact on deposit "for" the decedent at the time of his death. The difficulty with that position is that we cannot find on this record that there was any deposit "for" the decedent in any of Bache's various bank accounts.

To be sure, a deposit need not be in the decedent's name, and the statute may be satisfied where it is shown that one acting as trustee or agent for the decedent (whether or not the decedent is an undisclosed principal) makes a deposit in a bank. Cf *Estate of Lina Joachim*, 22 T. C. 875; *Estate of Mertyn S. Bradford-Martin*, 18 T. C. 544; *Estate of Irene de Guebriant*, 14, T. C. 611, reversed on another issue, 186 F. 2d 307 (C. A. 2); *Estate of Anna Floto de Eissengarthen*, 10 T. C. 1277; *Estate of F. Herman Gade*, 10 T. C. 585; *Estate of Elizabeth Hawxhurst Davey*, 10 T. C. 515; *Estate of Karl Weiss*, 6 T. C. 227; *Estate of Annina Fabricotti Fara Forni*, 47 B. T. A. 76; *Bank of New York v. United*

States, 174 F. Supp. 911 (S. D. N. Y.); *City Bank Farmers Trust Co. v. United States,* 174 F. Supp. 583 (S. D. N. Y.). No such showing has been made here. Although Bache may have been acting as agent for the decedent in selling his stock, it was not acting as agent or trustee for him making deposits in its various bank accounts. Nothing in the arrangements between Bache and the decedent requires the conclusion that it was his agent or fiduciary in respect of the bank accounts in its name. Those accounts were its own, and the decedent had no beneficial interest therein other than perhaps a priority or lien of some sort (along with all other customers similarly situated) that might relate to all of Bache's resources, whether bank accounts or other unencumbered assets, in the event of Bache's insolvency or bankruptcy. But the moneys were not deposited in Bache's accounts "by or for" the decedent. If the proceeds of the sale of the decedent's stock are to be treated as being on deposit "for" him, in what bank were they held? The record furnishes no answer.

Petitioner seems to argue that since the decedent was a "cash customer" of Bache and since Bache had bank accounts of its own in excess of what it owed the decedent, the Commissioner somehow or other must prove that Bache's bank accounts should not be attributed *pro tanto* to the decedent in order to sustain the deficiency. This is incorrect. The burden is upon petitioner, not upon the Commissioner. It is the petitioner who must show that deposits in one or more of these bank accounts were "for" the decedent to the extent of the amount that Bache owed him.

All of the cases cited above dealt with specific bank deposits or amounts owed by a specific bank, and it was possible to conclude that a specific account was referable, either in its entirety or in part, to the decedent, and that a deposit had been made in such account in be-

half of, or "for" the decedent. No such situation exists here. Petitioner has not even attempted to single out any particular account in Bache's name as being "for" the decedent. Nor was Bache under any obligation to pay the decedent out of any of its bank accounts; its obligation was merely to pay the decedent an amount equal to the proceeds of the sale, and it was free to make such payment out of any assets owned or controlled by it whether or not such assets consisted of bank accounts. Moreover, the fact that Bache's obligations to all of its customers at the time of decedent's death exceeded the aggregate of all of its bank balances indicates the unsoundness of attempting to treat those balances as including an amount "for" the decedent equal to the proceeds of sale of his stock. A conclusion that there were funds on deposit "for" the decedent at the time of his death would rest upon a mere fiction. Although it might be tempting to stretch the statute to provide an exemption from tax that seems so tantalizingly close, the fact is that Congress has drawn a clear line and that this case is on the wrong side of that line.

Estate of Lesley Diana Worthington, 18 T. C. 796, pressed upon us by petitioner, is distinguishable. That case relied upon the rule applied in the various other decisions cited above, and the Court seemed to be concerned only with whether the decedent had an unconditional right to the funds in question or whether her sole claim was a mere right to demand an accounting from the executor of her grandfather's will through whom she traced her rights in the assets involved. No consideration appears to have been given in that case to the further question, which we regard pivotal herein, whether the bank accounts themselves may properly be attributed to the decedent, once it is established that the decedent had a direct claim against the owner of the accounts. Moreover, there are factual differences between the cases —the *Worthington* case involved accounts in two specific

banks, and there was no finding, as here, that the total amount of the depositor's obligations exceeded the amounts on deposit. That case is not controlling.

2. *Whether shares of stock and cash due from The Texas Company to decedent at the time of his death are includable in his gross estate without reduction for income taxes subsequently withheld.* At the time of Ogarrio's death he was entitled to receive from The Texas Company 376 shares of its stock and $4,007.40 in cash in accordance with an employees' retirement plan. The 376 shares had a fair market value of $21,949 at that time. The stock and cash would have constituted income to Ogarrio when received, and, under Section 1441 of the Code,[1] The Texas Company was required to withhold a tax equal to 30 percent of these items. Petitioner contends that, as a result of the withholding requirement, the amount of each of these items includable in the decedent's gross estate must be reduced by 30 percent. We disagree.

Section 2106 of the Code provides that in determining the taxable estate of a nonresident alien deductions as provided in Sections 2053 and 2054 shall be allowed.[2] But

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[1] Sec. 1441. Withholding of Tax on Nonresident Aliens.

(a) General Rule.—Except as otherwise provided in subsection (c), all persons, in whatever capacity acting * * * having the control, receipt, custody, disposal, or payment of any of the items of income specified in subsection (b) (to the extent that any of such items constitutes gross income from sources within the United States), of any nonresident alien individual * * * shall (except in the cases provided for in section 1451 and except as otherwise provided in regulations prescribed by the Secretary or his delegate under section 874) deduct and withhold from such items a tax equal to 30 percent thereof * * *.

[2] Sec. 2106. Taxable Estate.

(a) Definition of Taxable Estate.—For purposes of the tax imposed by section 2101, the value of the taxable estate of every decedent nonresident not a citizen of the United States shall be determined by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

(1) Expenses, Losses, Indebtedness, and Taxes.—That proportion of the deductions specified in sections 2053 and 2054 (other than the deduction described in the following sentence) which the value of such part bears to the value of his entire gross estate, wherever situated. * * *

Section 2053(c) (1) (B) explicitly states that "Any income taxes on income received after the death of the decedent * * * shall not be deductible under this section."[3] And since the two items in issue were in fact received after the decedent's death, the statute expressly forbids any deduction in respect of income taxes thereon. Nor may the same result be obtained indirectly by shrinking the amounts includable in the gross estate in the first instance. To the extent that the same item is included in both the gross estate and taxable income received after the decedent's death Congress has provided relief in Section 691 by granting an income tax deduction based upon the estate tax imposed in respect of the same item. But there is no basis whatever for diminishing the amount includable in the gross estate.

Decision will be entered for the respondent.

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[3] Income taxes are deductible if they are on income properly includable in an income tax return of the decedent for a period before his death. Taxes on income received after the decedent's death are not deductible. Regs. 20.2053-6(f).

Stipulation of Venue.

IN THE TAX COURT OF THE UNITED STATES

Estate of Rodolfo Ogarrio (Daguerre), Deceased. FRANK RASHAP, Ancillary Administrator,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 89850

Stipulation as to Venue for Review of the Decision of the Tax Court of the United States.

It is hereby stipulated and agreed by and between the parties, through their respective counsel, that, pursuant to Section 7482(b) (2) of the Internal Revenue Code of 1954, the decision of the Tax Court in the above-entitled case may be reviewed by the United States Court of Appeals for the District of Columbia Circuit.

Dated: August 1, 1963.

FRANK RASHAP,
Petitioner,
Ancillary Administrator of the
Estate of Rodolfo Ogarrio
Daguerre, deceased.

LOUIS F. OBERDORFER,
Assistant Attorney General,
Counsel for the Respondent.

Petition for Review.

IN THE UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Estate of Rodolfo Ogarrio (Daguerre), Deceased, FRANK RASHAP, Ancillary Administrator,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

T. C. Docket No. 89850

The Estate of Rodolfo Ogarrio Daguerre, deceased, Frank Rashap, Ancillary Administrator, the petitioner in this cause, hereby files a petition for review by the United States Court of Appeals for the District of Columbia Circuit, of the decision of the Tax Court of the United States in the above cause, on May 8, 1963, 40 Tax Court No. 29, ordering and deciding that there is a deficiency in the estate tax for the above estate in the amount of $73,244.57. The estate tax return for the above named decedent, who died on January 17, 1957, was filed with the International Operations Division, Washington 25, D. C. and it has been agreed in writing between the petitioner and the Commissioner of Internal Revenue, the respondent herein, pursuant to the provisions of Code Section 7482(b) (2) that the aforesaid decision of the Tax Court of the United States may be reviewed by the United States Court of Appeals, District of Columbia Circuit.

Petition for Review

Nature of Controversy.

The controversies arising out of the estate tax return filed for the estate of the above named decedent are two in number:

(a) The decedent was a non-resident alien not engaged in trade or business in the United States. Prior to his death, his stock broker in New York had credited to his cash account with said stock broker the proceeds from stock sold for the decedent and which credit was outstanding at the time of his death. It was and is the petitioner's contention that these proceeds from the sale of the stock were held by the stock broker in its bank accounts for the account of the decedent and hence excludable from his gross estate under Section 2105(b) of the Internal Revenue Code of 1954. The Commissioner has opposed this position and the Tax Court sustained the position of the Commissioner.

(b) The second controversy arises because of the Commissioner's rejection of the petitioner's position that the value of a certain payment due to the decedent at the time of his death under the incentive compensation agreement plan of the Texas Company, consisting of 376 shares of Texas Company stock and $4,007.40 in cash, should be reduced for estate tax valuation by 30% of its value since the Texas Company was required to withhold and retain 30% of the value thereof under the provisions of Section 1441 of the Internal Revenue Code of 1954.

Petition for Review

The petitioner, being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Court and its decision entered thereto, desires to obtain a review by the United States Court of Appeals for the District of Columbia Circuit.

FRANK RASHAP,
Ancillary Administrator of the Estate of Rodolfo Ogarrio Daguerre, deceased, Petitioner.

(Verified by Frank Rashap, August 2, 1963.)

BRIEF FOR APPELLANT

No. 18,112

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Estate of RODOLFO OGARRIO (DAGUERRE), Deceased,
FRANK RASHAP, Ancillary Administrator,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

FRANK RASHAP, Esq.,
Ancillary Administrator,
Appearing Pro Se,
74 Trinity Place,
New York, New York.

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CITATIONS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,112

ESTATE OF RODOLFO OGARRIO (DAGUERRE), Deceased, FRANK RASHAP, Ancillary Administrator,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Tax Court (Record pp. 54a-64a), is reported at 40 T. C.———, No. 28.

Jurisdiction

This appeal involves estate taxes in effect on January 17, 1957 in the sum of $73,244.57 with interest in the sum of $23,216.52, totalling $96,461.09 and refund of estate taxes in the sum of $1,079.98, and is taken from a decision of the Tax Court entered on the 8th day of May, 1963 (Record p. 53a). The petition for review was filed August 5, 1963, pursuant to Sections 7482 and 7483 of the Internal Revenue Code of 1954.

Questions Presented

1. Whether the Tax Court correctly held that there was includable in the decedent's gross estate the sum of $235,599.54 received by Bache & Co. on January 16, 1957 as the proceeds of the sale of 3,936 shares of the common stock of The Texas Company, owned by the decedent and delivered to the purchaser by Bache & Co. on that day in completion of the New York Stock Exchange sale made by Bache & Co. for the decedent on January 10, 1957.

2. At the time of the decedent's death was his right to receive from The Texas Company 376 shares of its stock and the sum of $4,007.40 to be valued for estate tax purposes at the then market value of said shares plus the sum of $4,007.40 or at 70% of the market value of said shares and at 70% of $4,007.40 respectively?

3. Is the taxpayer entitled to a refund of estate taxes in the sum of $1,079.98?

Statute and Regulations Involved

The pertinent provisions of the applicable statutes and regulations involved are set forth in the appendix, *infra*.

Statement

The pertinent facts as found by the Tax Court and stipulated by the parties are as follows:

1. The decedent, Rodolfo Ogarrio (Daguerre) died on January 17, 1957 in the City of Mexico at 8 A.M. Mexico City time which was equivalent to 9 A.M. Eastern Standard time in New York City (Record pp. 17a, 18a).

2. The decedent had been an employee of The Texas Company for many years prior to his retirement in December 1950. At the time of his death, and for many years

prior to his death, he was a non-resident, not a citizen of the United States and not engaged in business in the United States (Record p. 18a).

3. The decedent, at the time of his death and for a long time prior thereto, was a customer of the stockbrokerage firm of Bache & Co. in New York City. His account was what is known as a "cash account", i.e., an account where he agreed and was obliged to pay cash in full on receipt of all securities purchased for him by Bache & Co. and where Bache & Co. agreed and was obliged to sell securities for the decedent's account only on receipt of full payment in cash on delivery of the securities sold. A printed form of "Customer's Agreement" was signed by the decedent and delivered to Bache & Co. on May 4, 1953 which was in effect up to the time of his death (Record pp. 18a and 29a).

4. On January 10, 1957 (seven days before the decedent died) Bache & Co. sold on the New York Stock Exchange 3,936 shares of The Texas Company for the decedent's account, which shares were registered in the decedent's name and were then held by Bache & Co. in safekeeping for him. The amount for which that sale was effected was, after deducting brokerage commissions and transfer taxes, the sum of $235,599.54. Under the rules of the Stock Exchange the sale was to be completed by delivery of the shares and payment of the selling price at the Stock Clearing Corporation on January 16, 1957. Stock Clearing Corporation was the clearing house of the New York Stock Exchange (Record p. 19a).

5. On January 16, 1957 Bache & Co. delivered to the purchaser, through the Stock Clearing Corporation and for the decedent's account, the 3,936 shares of the Texas Company which they had sold for him on January 10, 1957. On the same day Bache & Co. received payment for said shares, through the clearance at the Stock Clearing Corporation, which payment was, after deducting commissions

and stock transfer taxes, $235,599.54. In that clearance transaction Bache & Co. owed Stock Clearing Corporation, after offsetting purchase transactions against sale transactions, $255,969.72 and it delivered to Stock Clearing Corporation its check in that amount, drawn on the Guaranty Trust Company (Record p. 19a).

6. At the close of business on January 16, 1957 the regular books of account of Bache & Co. showed that, as a result of the delivery of his 3,936 shares of The Texas Company that day and the receipt of payment for those shares, his account had been credited with $235,599.54. The next day, but subsequent to 9 A.M. E.S.T. (the hour of the decedent's death in Mexico), Bache & Co. delivered to the Hanover Bank, for the account of the decedent, its check No. 24412 in the sum of $257,350.53 which included the $235,599.54 which Bache & Co. had received on January 16, 1957. That check No. 24412 was drawn on Bache & Co.'s checking account in the Hanover Bank (Record, p. 20a).

7. Bache & Co. had on deposit in its checking accounts in banks in the City of New York the sum of $2,259,671.58 on January 15, 1957, the sum of $2,290,153.42 on January 16, 1957 and the sum of $2,852,140.95 on January 17, 1957 (Record 50a & 52a).

8. At the close of business on January 16, 1957 Bache & Co. had sufficient funds on deposit in all of its banks to pay all checks issued by it on and prior to that day including the check dated January 17, 1957 in the sum of $257,250.53 referred to in Statement of Fact No. 6 above. It did not have sufficient funds on deposit on that day to pay all credit balances to all of its customers had all of its customers made demand on that day for immediate payment (Record, p. 51a).

9. The decedent, as a former employee of The Texas Company, became entitled on January 1, 1957 to receive

from that Company 376 shares of The Texas Company and the sum of $4,007.40 under the Company's retirement plan. But since the decedent was a non-resident alien The Texas Company was required to deduct and withhold a tax of 30% by reason of Section 1441 of the Internal Revenue Code of 1954. The amount of that total withholding tax was $7,864.47 (Record, pp. 16a & 17a).

10. At the time of decedent's death The Texas Company had not delivered to the decedent any of the shares of The Texas Company or the sum of money to which he became entitled on January 1, 1957 under the retirement plan nor, at the time of his death, had any of the 30% withholding tax on income been paid to the Internal Revenue Service by The Texas Company, by the decedent or by any one on his behalf (Record, pp. 21a & 22a).

11. On the decedent's estate tax return the petitioner reported the value of decedent's right, under the retirement plan, to receive, on January 1, 1957, 376 shares of The Texas Company as being the sum of $21,949.00 which was the market value of 376 shares of The Texas Company on January 17, 1957. In an "amended" return filed on July 30, 1958, the petitioner set forth that the correct value of the right to receive those shares was $15,286.75, namely, the market value on January 17, 1957 less the sum of $6,662.25 which was required to be deducted and withheld by The Texas Company (Record, p. 24a).

12. The petitioner also concedes that 70% of the aforementioned sum of $4,007.40, to which the decedent had also become entitled on January 1, 1957 under The Texas Company retirement plan, is includable in the decedent's taxable estate.

The Tax Court held:

1. That the proceeds of the sale of the securities did not qualify as "bank deposits" under Section 2105; and

2. The estate was not entitled to a deduction in respect of income taxes on income received after the death of the decedent, as claimed by the petitioner.

Summary of Argument

1. The petitioner contends on this appeal from the stipulated facts and the evidence before the Tax Court and the inferences and presumptions properly drawn therefrom that Bache & Co. held $235,599.54, the proceeds of the sale of the stock, for the decedent at the time of his death in the Bache & Co. bank accounts and was therefore not includable in the gross estate of the decedent and the Tax Court erred in holding otherwise. The proceeds of the sale of the stock were not suspended in mid-air. They were in Bache & Co. bank accounts, and belonged to decedent prior to his death.

2. The Tax Court erred in refusing to find that the petitioner was entitled to a refund of $1,079.98, representing the refund due the estate on account of 30% withholding for income taxes required by Section 1441 on stock and money owed to him by an American corporation and which were included in full in his gross estate.

ARGUMENT

POINT I

At the time of the decedent's death on January 17, 1957, Bache & Co. held for the account of the decedent in its bank accounts the sum of $235,599.54.

On January 16, 1957, the day before the decedent died, Bache & Co. as brokers for the decedent delivered and received payment for 3,936 shares of The Texas Co. belonging to the decedent (Record, p. 19a). The decedent

was a "cash customer" of the firm and by the close of business on that day his account on the books of that firm showed that they no longer held those 3,936 shares of The Texas Co. for him but that they held, instead, the sum of $235,599.54 for him (Record, pp. 18a; 20a). We believe that the stipulated facts can lead to no other conclusion than the one we are urging, namely, that Bache & Co. held that sum of money for him and that they held it in their bank accounts. The Commissioner, contends that Bache & Co. simply "owed" the decedent that sum at the time of his death or, if they "held" it rather than "owed" it, that the money cannot be regarded as being on deposit in any of the Bache & Co. bank accounts when the decedent died. Because of the fact that Bache & Co. delivered the decedent's 3,936 shares of The Texas Co. and received payment for it through a "clearing" operation with the Stock Clearing Corporation, we will examine into and analyze the legal consequences of that "clearing" operation and show why we feel that our conclusions are the only ones that can properly be drawn by our courts (Record, pp. 19a, 20a).

Since the decedent was a "cash customer" of Bache & Co. and not some other type as, for instance, a "margin customer", the relationship between them required the decedent to pay cash, in full, whenever Bache & Co. purchased securities for him; and, similarly, required Bache & Co. to accept only cash, in full, when they delivered his securities in completion of a sale made by them for him (Record, pp. 18a, 19a). Their respective obligations to each other were clear in that regard and the Customer's Agreement that the decedent signed and delivered to Bache & Co. in May 1953 in nowise changed or modified his "cash customer" relationship (Record, p. 28a, Exhibit 2-B). That relationship is recognized by the overwhelming weight of authority to mean that the decedent was a principal and Bache & Co. were his agents in all transactions where they purchased or sold securities for his account. It definitely

negatives the idea or concept of a debtor-creditor relationship.

> 12 *Corpus Juris Secundum*, § 11, pages 30-31;
> *Gruntal* v. *U. S. Fidelity & Guaranty Co.*, 254 N. Y. 468;
> *Tuckerman* v. *Mearns*, 262 Fed. 607, 609;
> *Robinson* v. *Ungerleider*, 313 Pa. 301, 304.

We conclude, therefore, that the accounting records of Bache & Co., setting forth that $235,599.54 had been credited to the decedent's account on that day can only refer to the dollar amounts held by them for his account, since the only relationship between them was that he was their "cash customer" (Record, pp. 20a; 18a). Those accounting records, in other words, must be viewed and interpreted in the light of the fundamental and basic relationship between the parties.

On page 9 of respondent's brief, submitted to the Tax Court, the following appears:

> "Rodolfo Ogarrio, however, owned stock in the Texas Company prior to his death. The fact that he sold the stock shortly before he died, and that the proceeds were probably held in one or more of the various bank accounts of the brokerage firm at the time of his death, shows no disposition whatsoever of the decedent to make a deposit with a United States bank."

This statement by the respondent concedes that the proceeds of the sale of the stock were in a bank account of Bache & Co., so it must now be determined whether or not this was a deposit *by or for* the decedent, a non-resident alien not doing business in the United States.

In the Matter of the Estate of Anna F. De Eissengarthen (Docket No. 15545, 10 TC, No. 165. Promulgated June 30, 1948), the Tax Court held that the money on deposit in a

New York Bank should not have been included by the Tax Commissioner as part of the gross estate and in discussing the use of the words "by or for" quoted from the decision of the Tax Court in the *Estate of Karl Weiss* (6 T. C. 227), as follows:

> "'The words must be given their usual meaning, since no reason appears for giving them any special or restricted meaning. Congress did not describe the deposit as one in the name of the decedent or one made directly by him, nor did it mention a direct contractual relationship between him and the bank. If it had intended to limit the application of this section, as contended for by the respondent, it could have found better words to convey that thought. * * *
>
> "'The use of the words "by or for" indicates that the deposit may be made by someone other than the decedent. A usual meaning of "for" when thus coupled with "by" is "for the use and benefit of" or "upon behalf of."' * * *'"

We contend that given this meaning to the use of the words "by or for" by Congress, coupled with the inescapable fact that the proceeds of the sale of the stock involved herein were in a bank account of Bache & Co., the Tax Court erred in not holding that the moneys were deposited in the bank *for* the decedent and therefore not includable in the gross estate.

Judge Raum, in the Court below, in his opinion makes the following observation:

> "Although it might be tempting to stretch the statute to provide an exemption from tax that seems so tantalizingly close, the fact is that Congress has drawn a clear line and that this case is on the wrong side of that line."

It is our considered opinion that the interpretation of the words "by and for" used by Congress in the section of the

Internal Revenue Code under consideration on this appeal is broader than that made by Judge Raum. It is to be noted that Congress used the term "by and for" and not merely the word "by". The expression "by and for" is comprehensive and intended to be comprehensive and to include a situation as existed here where the funds were in the bank account of Bache & Co. as conceded by the government in the court below to be in Bache & Co. bank accounts and therefore the proceeds of the sale of the stock were in the bank account Bache & Co. held "for" the decedent. The spirit and intention of this section of the Internal Revenue Code was to encourage deposits in banks by non-resident aliens for obvious reasons. Congress was farsighted in enacting this exemption section in the light of present-day concern relative to the flight of the dollar and an affirmance of the Tax Court's decision in this case would militate against the spirit and intention of Congress.

Although our research has not revealed any cases where clearances between stockbrokers have been analyzed by the courts, the problem presented does not appear to be substantially different from that faced by courts where clearances of checks, notes, etc., between banks are involved. The principal difference is that the stockbrokers "clear" deliveries of shares of stock and other securities as well as payments. But just as a payment in a clearance is, in law, regarded as a payment in fact, so also should our courts regard a delivery of shares, effected through a clearance, as a delivery in fact to the purchaser.

> *Hallenbeck* v. *Leimert*, 72 Fed. (2) 480;
> *In re Smith, Lockhart & Co.*, 3 Fed. (2) 444;
> *Columbia Knickerbocker Trust Co.* v. *Miller*, 215 N. Y. 191.

Bank clearings also differ from stockbroker clearings, in that bank clearing houses generally provide a time period for the drawee bank to examine and reject items cleared.

Consequently the courts regard payments in a bank clearance as tentative until the time to reject and return an item has passed. But when that time has passed, the clearance constitutes a payment in fact of the items involved in the clearance.

In our case the very fact that Bache & Co. entered, on its bookkeeping account with the decedent, that it had received and credited to his cash account on January 16, 1957 the sum of $235,559.54 is proof of its acknowledgment of the receipt of payment and of holding it for his account (Record, p. 20a).

> *Baldwin's Bank* v. *Smith,* 215 N. Y. 76, at page 83;
> *First National Bank* v. *National Park Bank,* 181 App. Div. 103, at page 106.

The clearance transaction, which resulted in Bache & Co. making that entry on its books of account, constituted a receipt of payment by Bache & Co. for the account of decedent in exchange for the delivery of the decedent's 3936 shares of The Texas Co. that Bache & Co., in and by that same clearing transaction, delivered to the purchaser. By reason of the fact that Bache & Co. offset the amount of that payment against purchases they had made for themselves or other customers, which were "cleared" in that same clearing operation, it was incumbent on Bache & Co. to immediately substitute, and hold for the decedent, other funds of an equal amount. If Bache & Co. had not had other funds of its own on deposit and had not made an immediate substitution of those other funds, how could Bache & Co. deny that their use of the proceeds of the sale of the decedent's securities in the clearing transaction was a conversion? The fact that Bache & Co. had adequate other funds available and acknowledged on their books of account that very day that they were holding those other funds for the decedent was, we submit, equivalent in law to receiving cash from the purchaser of the decedent's

shares and depositing it in one of their banks for his account (Record, pp. 52a; 20a).

In *Van Alen* v. *American National Bank*, 52 N. Y. 1, the New York Court of Appeals expressly held that a principal can trace his property into funds which his agent has substituted for the specific funds which the agent received for or on behalf of the principal. In that case Chief Judge Church stated:

> "Church, Ch. J. The learned counsel for the appellant is undoubtedly right in the position that if, as between the plaintiff and Van Alen & Rice, there was no trust impressed upon the deposit in the bank, defendant, to an amount equal to the proceeds of the bonds sold by Van Alen & Rice for the plaintiff, this action cannot be maintained. It is settled that the holder of a check cannot maintain an action against the drawee, after a refusal to pay, for want of privity, and that a check against a general bank account does not operate as an assignment. (46 N. Y., 82; 10 Wal., 152, and cases there cited.) This action is based upon another principle equally well settled, viz., that so long as money or property belonging to the principal or the proceeds thereof may be traced and distinguished in the hands of the agent or his representatives or assignees, the principal is entitled to recover it unless it has been transferred for value without notice. (2 Grattan, 544; *Pennell* v. *Deffell*, 4 D. Gex., M. & G., 372; 6 Jones Eq. R., 34; 2 H. & M., 417; 2 Kent's Com., 796, 801.) It appears to me clear that Van Alen & Rice were the agents of the plaintiff to sell the bonds, and were bound to keep the proceeds of the same for him. He owned the bonds, directed their sale, and also directed that the proceeds should be kept for him in a particular manner, and he was notified by Van Alen & Rice that they had been sold and the avails placed and would be kept as directed. These undisputed facts

establish the relation of trustee and cestui que trust between the plaintiff and Van Alen & Rice as to the proceeds of these bonds.

"It is claimed, however, that this principle is not applicable because the identical money for which the bonds were sold was not deposited. This objection would be fatal if there had in fact been no substitution of other money for the proceeds of the bonds. It seems to have been assumed on the trial that the check given upon the sale of the bonds was used by Van Alen & Rice for their own benefit, and if the evidence had stopped there the trust fund would have been gone and dissipated, and of course beyond the reach of being traced. But the uncontradicted evidence is, that on the same day Van Alen & Rice substituted other money for that obtained for the bonds, and placed it in the bank defendant to their credit to be retained for the plaintiff, as arranged between them, and notified the plaintiff thereof. The letter of the 21st of February to the plaintiff, in connection with the evidence of G. R. Van Alen, is conclusive that the money referred to in the letter was that deposited in the bank defendant. The point made is this: A having $100, the proceeds of a sale of property of B, intends to place it in a repository and keep it for B, and instead of putting the identical bank bills in the designated place substitutes others of the same amount and keeps them for B as such proceeds, can there be a doubt that the $100 thus substituted would occupy the same position as the particular bills obtained for the property, and that they would be impressed with the same trust? Suppose Van Alen & Rice had got the check cashed by a third person and deposited the money, it would of course be regarded as the proceeds of the check, and belong to the plaintiff as effectually as the check itself. Does it make any difference whether the money was obtained from a third person upon the check or

from the safe of Van Alen & Rice? In either case the money is the proceeds of the check and stands in lieu of it. It is said that the secret intention of Van Alen & Rice cannot effect such a result. Between them and the defendant as to the substitution it was not secret. They in substance notified the plaintiff that they had placed on deposit the proceeds of his bonds and would keep it for him. They did deposit the amount which they treated as the proceeds, and declared it to be such. Can they deny it? Can any one for them? If I send a note to an attorney to collect, and deposit the money in a bank in his own name and keep it for me, is my title to the money impaired because he fails to deposit the identical bills? My agent collects $100 rent for me and puts the bills in one pocket and takes the same amount from another pocket and deposits it and notifies me. Are my rights gone by the change of money? I think not. Stripped of unsubstantial forms, the case presented is that of a person delivering stock or bonds to an agent for sale with directions to deposit the proceeds in a bank to the credit of the agent, but to keep it in that way for him, and the agent follows the directions. Can there be a doubt as to the ownership of the money as between the agent and the principal? Clearly not. Suppose the principal had directed the agent to loan the money on a note or mortgage, would not the security belong to the principal? The bank defendant upon receiving the deposit became the debtor ostensibly to the depositor, but equitably to the real owner. The obligation incurred by the bank was to pay the money on demand in the usual course of business, and had a right to require a check from the depositor. When this formality was complied with and the bank was notified that the money actually belonged to the plaintiff, it did not lie in its mouth to set up a want of privity. Privity has nothing to do with the question. The bank had the plaintiff's money

and gave its obligation in form to another person, but the obligation was in fact owned by the plaintiff and he can enforce it. There is no mystery or sanctity respecting the obligations of a bank in such a case, different from those of a private person, and if this money had been loaned to the latter under an agreement to repay it upon the presentation of the agent's check, he would not have been heard to say when the plaintiff presented the check, 'I made no contract with you, and although I have no claim to the money you cannot maintain an action because there is no privity between us and the check does not operate as an assignment.' The answer would be that the plaintiff owned the obligation, and had the same right to recover it as he would if the person had possession of his horse and refused to deliver it on demand. The only effect of the direction to deposit in a particular manner was to relieve the agent upon complying with the direction from liability for loss without his fault. In the absence of such a direction the principal, while he might pursue and claim the money, would not have been obliged to do so, and could have also held the agent personally.

"It is objected also that the money was so mingled with the agent's own money as not to be traceable in the hands of the defendant. When Van Alen & Rice deposited this money for the plaintiff they included with it a few dollars of their own. But this does not affect the plaintiff's right to it. When a trustee deposits trust moneys in his own name in a bank with his individual money, the character of the trust money is not lost but it remains the property of the *cestui que trust*. If such money can be traced into the bank, and it remains there, the owner can reclaim it. When deposited, the bank incurred an obligation to repay it, which is not lessened or impaired because it incurred, at the same time, an obli-

> gation to pay other money belonging to the agent individually. If A. sells B.'s horse for $100, and puts it in a box with $100 of his own, the $100 of B. may be claimed by him although the particular bills constituting it could not be identified. So if the same $200 were deposited in a bank to the credit of A., the title of B. to $100 would not be affected by the association, and the bank would owe that money to B. in equity, although it owed A. also for his individual money. These views are not only consonant with integrity and justice, but are fully sustained by authority."

The case of *Van Alen* v. *American National Bank*, 52 N. Y. 1, has been cited with approval on many occasions by the New York courts. See, for example,

> *The People* v. *City Bank of Rochester*, 96 N. Y. 32;
> *Matter of Cavin* v. *Gleason*, 105 N. Y. 256;
> *Brown* v. *Spohr*, 180 N. Y. 201;
> *Matter of International Milling Co.*, 259 N. Y. 77.

It seems to us that the Commissioner here must be taking the same position as was the defendant in *Van Alen* v. *American National Bank* (*supra*). The comments of the Chief Judge in that case (52 N. Y. 1 at p. 10) are particularly appropriate, were he stated,

> "* * * The question is, therefore, entirely between the plaintiff and Van Alen & Rice; the former claims the money and the latter admits the claim, and the facts sustain the justice of it. The defendant occupies the position of objecting to the title of the plaintiff without having or claiming any title itself. If Van Alen & Rice had refused to give a check the plaintiff might have been obliged to resort to an equitable action, but if a title is established by the plaintiff, and he presented the evidence upon which

> the defendant agreed to pay the money, I see no reason why an action at law may not be maintained, but it is unnecessary to pass upon this point as it was not made. Neither was the point made that a part of the deposit could not be recovered.
>
> "It was suggested on the argument that notice to the bank by the depositor was necessary to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important."

Substitutions of equivalent property between such brokers and their customers is not an uncommon practice as this Court undoubtedly knows. An example of a substitution of stock certificates by a broker for the benefit and convenience of his customer is presented by the case of *Commissioner of Internal Revenue* v. *Dashiell*, 100 Fed. (2nd) 625. In analyzing the effect of such a substitution as far as the parties were concerned Circuit Judge Treanor stated, at page 626:

> "(1) We agree with the conclusions of the Board of Tax Appeals that the transaction was not intended to be, and did not constitute, a short sale within the practice of the New York Stock Exchange and in our opinion the interested parties treated the transaction as 'a cash sale with immediate delivery by an agent of the seller'. The parties intended the sale to be consummated on December 31, 1931, and as a practical matter it was consummated on that date, although the transaction relating to the sale was not fully completed until the taxpayers certificates of stock were delivered to the New York broker early in the year

> 1932. When the New York broker, acting under the instructions of the taxpayer, sold the shares to the New York purchaser as a cash sale and delivered 'loaned' certificates for 500 shares to the New York purchaser, the shares thus delivered being substituted for the shares of the taxpayer and thereafter credited the cash received for the shares to the taxpayers Chicago broker, the New York broker became, as between himself and the taxpayer, the owner of 500 shares of the taxpayer's Vanadium stock and was entitled to a delivery of the same. The taxpayer had lost his legal right to retain the 500 shares of stock by reason of his acceptance, through his Chicago broker, of payment for the same, regardless of actual delivery of the certificates of the taxpayer, and regardless of the question of the passing of legal title to the shares. The transaction was so far advanced in December, 1931, 'that the petitioner (taxpayer) was bound to deliver the stock to the broker at a price which was then determined by the sale the broker made. That sufficed to make the loss certain and established the amount.''

Finally, it would border almost upon the absurd to say that Bache & Co. were holding the decedent's $235,599.54 otherwise than in one or more of their bank accounts. The comments of Chief Judge Sharpe of the Supreme Court of Michigan in the case of *Hibberd* v. *Furlong*, 269 Mich. 514; 257 N. W. 737, are particularly appropriate. In deciding that the customer must have understood that his money would be kept in the broker's bank account, the Chief Judge stated,

> ''The authorities relied on by plaintiff are applicable to an agent who receives moneys for, and to be delivered to, his principal, and who mingles them without authority in his personal account. Under the agency here created, the defendants received

plaintiff's check for a specific purpose and deposited it, as he expected them to do, in their own account, to be in readiness at all times to make the purchase of stock in compliance with his instructions. Had they kept the check in their possession until the purchase was made, it would then have been necessary for them to deposit it in their own account in order to avoid the publicity incident to the purchase, and, if they had not presented it within a reasonable time, the plaintiff would have been discharged from liability thereon to the extent of the loss caused by the delay. Comp. Laws 1929, § 9435.

"'As a general rule of law every grant of power implies and carries with it, as an incident, authority to do with whatever acts, or use whatever means are reasonably necessary and proper to the accomplishment of the purpose for which the agency was created, unless the inference of such power is expressly excluded by the instrument creating the agency or by the circumstances of the business to which the agency relates. Such incidental authority includes all acts and things which are connected with and essential to the business in hand; it is measured by the nature and necessities of the purpose to be accomplished and is prima facie co-extensive with the business intrusted to the agent's care. The means adopted, however, should be such as are most usual, such means indeed as are ordinarily used by prudent persons in doing similar business. This rule applies both to general and special agent unless the manner of doing the particular act is prescribed by the power.' 2 C. J., pp. 578, 579, 580.

"The conclusion seems unavoidable that the defendants handled this check in just the way the plaintiff desired and intended they should handle it, and that the loss incident to the closing of the bank in which it was deposited must be borne by him and not by the defendants."

In the *Estate of Ruth Waldstein,* deceased, 35 TC No. 20, docket 65776 filed October 31, 1960, the decedent had died intestate in a German concentration camp in Holland, a non-resident alien not engaged in business in the United States.

In this case, the funds had been deposited pursuant to an order of the Surrogate's Court, New York County, by the Treasurer of the City of New York for the benefit of the decedent's mother or such other person or persons who may hereafter appear to be entitled thereto. The Treasurer of the City of New York deposited the funds in the Manufacturers Trust Company in New York City. Thereafter the Alien Property Custodian of the United States issued a vesting order with respect to the decedent's mother's remainder interest in the trust. Pursuant to an order of the Surrogate's Court the Alien Property Custodian was authorized to withdraw the funds and pursuant to Section 12 of the Trading with the Enemy Act the Alien Property Custodian deposited the funds with the Treasurer of the United States who, in turn, deposited them with the Federal Reserve Bank of New York where they were held in a general account for the account of the Custodian, together with other public funds. The Tax Court held under these facts and circumstances that these funds were excludable from the decedent's gross estate.

This case, we contend, is strong authority for petitioner's position that it is not necessary that petitioner establish segregation of funds in the bank account of Bache & Co. as specifically belonging to the decedent at the time of his death. It is sufficient that the funds were in a bank account of Bache & Co. even though commingled with other funds belonging to other customers or to Bache & Co. itself.

> "Respondent's position in *Joachim* was that section 863(b), *supra,* was not applicable because at the time of her death the fund was held not for Lina but for the United States. The respondent seems to urge the

same proposition here with the additional argument that the transfer of Ruth's 56 per cent interest to the Treasurer of the United States and to the New York branch of the Federal Reserve Bank fixed the situs of the fund otherwise than 'deposited with any person carrying on the banking business' within the intendment of section 863(b), *supra.*

"* * *

"Accordingly, we hold that for Federal estate tax purposes the funds were on deposit for the benefit of decedent with the Manufacturers Trust Company, a private banking institution, and thus were excludible from decedent's gross estate under the provisions of section 863(b), *supra. Cf. Estate of Karl Weiss,* 6 T. C. 227 (1946) [Dec. 14,982] acq. 1946-2 C.B. 5."

In conclusion we respectfuly submit that the Tax Court should have found, from the evidence before it and the inferences that can reasonably and properly be drawn and the presumptions that follow from the evidence, that Bache & Co. held $235,599.54 for the decedent, at the time of his death, in the Bache & Co. bank accounts.

POINT II

The funds of the decedent totalling $235,599.54 and held by his brokers in their bank accounts are exempt from the U. S. Estate Tax since the decedent was a non-resident not a citizen of the United States not doing business in the United States at the time of his death.

The Commissioner has stipulated that the decedent was a non-resident alien, not a citizen of the United States, and was not doing business in the United States at the time of his death and for a number of years prior to his death (Record, p. 18a). In our preceding point we have shown

why we believe this Court should hold that Bache & Co. at the time of decedent's death held in their bank accounts for him the sum of $235,599.54. That sum represented the proceeds of the sale of 3,936 shares of The Texas Co. which Bache & Co. had sold for him on January 10, 1957 and delivered to the purchaser on January 16, 1957 (Record, p. 19a). If such be the decision of this Court, then it seems clear that that fund is not includible in the decedent's gross taxable estate, by reason of the provisions of Section 2105(b) of the Internal Revenue Code. That Section provides as follows:

> "(b) Bank Deposits.—For purposes of this subchapter, any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death shall not be deemed property within the United States."

The Tax Court has held on several occasions that funds held in a bank account here by a stockbroker, an executor, a custodian or other type of agent or fiduciary, for the account of a non-resident not a citizen of the United States who was not engaged in business in the United States at the time of his death, come within the terms of that Section of the Code and are therefore exempt from the Estate Tax. In our case the decedent, Rodolfo Ogarrio (Daguerre), was himself the customer of the stockbroker. The Tax Court has gone even further in other cases and held that where an alien decedent was not a customer of the stockbroker but was nevertheless the equitable owner of funds held in the stockbroker's bank account, those funds were exempt.

In the *Estate of Lesley Diana Worthington,* 18 T. C. 796, Decision No. 19,116 (July 25, 1952) the alien decedent was a granddaughter of Lewis Worthington who had died in the United States in 1919. In 1946 and 1947 the Surrogate

of New York County construed the will of Lewis Worthington and held that Lesley Diana Worthington was solely entitled to the remainder under that will upon the death on August 15, 1942 of the life-tenant, the widow of Lewis Worthington. When Lesley Diana Worthington died on April 29, 1945 a stock exchange firm held the sum of $80,522.36 in its New York bank accounts for the account of the executor of the Lewis Worthington estate. The Tax Court held that that sum of $80,522.36 was exempt from the U. S. Estate Tax since the decedent, Lesley Diana Worthington, was unconditionally entitled, at the time of her death, to receive it from the executor of her grandfather's estate.

In *Estate of Anna Floto DeEissengarthen, supra,* the Tax Court held that funds held in a custody account by the Guaranty Trust Co. for "Dr. Jean Eissengarthen, deceased" belonged to the sole heir of Dr. Jean Eissengarthen, namely the non-resident alien decedent, Anna Floto DeEissengarthen, and therefore those funds were exempt from U. S. Estate Tax in her estate. In the course of his opinion Judge Black summarized the problem and solution in that case as follows:

> "The facts which we think are decisive are these: It has been stipulated that 'Under the law of Switzerland at all times material herein, upon the death of a decedent, the property of the decedent becomes, by force of law, as of the date of his death, the property of the person or persons appointed by his last Will and Testament as his heir or heirs.' And it has been further stipulated that 'There were no known creditors of Jean Eissengarthen residing in the State of New York on or after the date of his death.' These things being true, it follows, we think, that immediately upon the death of Jean, Anna became the sole owner of the bank deposit in question and notwithstanding the name of the account was not changed from 'Dr. Jean Eissen-

garthen, deceased' to that of 'Anna Floto de Eissengarthen' it immediately became her property and at all times prior to her death it was money on deposit in the United States for her use and benefit. This, we think, fulfills the requirement of the statute. Cf. *Estate of Elizabeth Hawxhurst Davey, Deceased,* 10 T. C. 515 (Dec. 16,305); *Estate of F. Herman Gade, Deceased,* 10 T. C. —, No. 76 (Dec. 16,326) promulgated April 6, 1948. The fact that the bank would not have paid over the money to its rightful owner without the appointment of an ancillary administrator, it seems to us, is not controlling. That was merely for the bank's protection and does not affect in any way Anna's ownership of the deposit at the date of her death."

Situations similar to those in the cases we have just referred to were presented to the Tax Court in the *Estate of Mertyn S. Bradford-Martin,* 18 T. C. 544 (Decision No. 19,045); *Estate of Elizabeth Hawxhurst Davey,* 10 T. C. 515 (Decision No. 16,305) and in *Estate of Irene de Guebriant,* 14 T. C. 611 (Decision No. 17,600) and in each case the Tax Court held that the funds were held "for" the non-resident alien decedent, and therefore exempt, even though the bank account was in the name of an agent or fiduciary.

We respectfully submit that the instant case is a stronger case for the taxpayer than any of those we referred to immediately above inasmuch as the agent, Bache & Co., had received the 3,936 shares of The Texas Company from the decedent and acknowledged, immediately upon selling and delivering the shares, that they held the proceeds for his account.

The fact that Bache & Co. made an entry in the cash account of the decedent on January 16, 1957 prior to his death, crediting him with the proceeds of the sale of the

stock and the following morning, January 17, issued a check in the sum of $257,250.53, representing the proceeds of the sale less commissions, taxes, etc., on the Hanover Bank, can lead only to the unescapable conclusion that these funds evidenced by this check were in Bache & Co.'s account with the Hanover Bank prior to the death of the decedent and were being held there *for* him (Record, p. 20a).

POINT III

The value of decedent's right at the time of his death to receive under the Incentive Compensation Agreement of The Texas Company 376 shares of the common stock of The Texas Company and the sum of $4,007.40 which right accrued on January 1, 1957 was the total sum of $18,091.43.

It has been stipulated that on January 1, 1957 the decedent, a non-resident alien not engaged in business in this country, had the right, subject to the tax withholding provisions of the Internal Revenue Code of 1954, to receive from The Texas Company under its Incentive Compensation Agreement Plan 376 shares of that company's stock as well as the sum of $4,007.40 (Record, pp. 20a and 21a).

The Section of the Internal Revenue Code of 1954 covering the withholding tax on compensation payable to non-resident aliens not engaged in business is Section 1441. This Section reads in part as follows:

> "Sec. 1441 (1954 Code). (a) GENERAL RULE.—Except as otherwise provided in subsection (c), all persons, in whatever capacity acting (including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States) having the control, receipt, custody, disposal, or payment of any of the items of income specified in subsection (b) (to the extent that any of such items

> constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and composed in whole or in part of non-resident aliens, shall (except in the cases provided for in section 1451 and except as otherwise provided in regulations prescribed by the Secretary or his delegate under section 874) deduct and withhold from such items a tax equal to 30 percent thereof."

The above section clearly required The Texas Company, as withholding agent for the Treasury Department as defined in Section 1465 of the Internal Revenue Code of 1954, to "*deduct and withhold*" a tax of 30% of the gross income payable by The Texas Company to decedent. In this particular case the cash to which decedent was entitled did not equal 30% of the value of the 376 shares of The Texas Company stock plus 30% of the $4,007.40 in cash. If, in fact, the decedent in January prior to his death had been entitled to receive sufficient cash from The Texas Company to cover the 30% withholding tax on both the 376 shares and the $4,007.40 the company would undoubtedly have deducted and withheld from the cash the 30% tax and would have remitted the shares and any cash balance to decedent. If that had been possible and had occurred prior to decedent's death, the Commissioner probably would not have taken the position that the 30% withheld by The Texas Company as the government's withholding agent constituted a taxable asset of the decedent in this country.

At this point we call to the attention of the Court that it is not the value of the 376 shares of The Texas Company stock plus the sum of $4,007.40 that is taxable but the right of the decedent to receive the same under the terms of the Incentive Compensation Agreement Plan, a right which was subject to the 30% tax withholding provision of Section 1441. It is important to realize that this 30% withholding tax provision imposed an absolute obligation on

The Texas Company. Furthermore, the 30% tax on the decedent's income which The Texas Company was required to deduct and withhold was not a tentative tax. Under no conditions could the decedent or his estate obtain a refund. It was not subject to any deduction or exemption. See Section 871 of the Internal Revenue Code and Regulations 1.871-7 thereunder.

In determining the value of property for estate tax purposes Regulation 20.2031-1(b) reads in part as follows:

> "§ 20.2031-1(b) Valuation of property in general. The value of every item of property includible in a decedent's gross estate under sections 2031 through 2044 is its fair market value at the time of the decedent's death, * * * The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."

Since the only enforceable right the decedent had against The Texas Company at the time of his death was the right to receive 70% of the value of the said shares and of said sum of $4,007.40 that is the only amount that could be taxed.

In an analogous situation the Court of Appeals for the Second Circuit in *Aramo-Stiftung* v. *Commissioner of Internal Revenue*, 172 Fed. (2d) 89*, on an appeal from the Tax Court, 9TC947, involving a determination of the liability of a personal holding company for surtaxes held that the surtax liability for undistributed income could only be computed on the income remaining after deduction of the amount of the ordinary income taxes that had to be paid even though such ordinary income taxes had not then been paid.

Therefore the Commissioner should have valued for estate tax purposes the right of decedent to receive the 376

shares of The Texas Company stock and the sum of $4,007.40 at 70% of their combined value namely the sum of $18,091.43, thereby entitling the petitioner to a tax refund in the sum of $1,179.98. The refund arises by reason of the following:

On the original Estate Tax return filed by the petitioner, the value of the 376 shares of The Texas Company was listed at their market value on the date of decedent's death. Thereafter, in order to try and correct his error, petitioner filed a formal claim for refund attached to which was an "amended" return setting forth the basis for the claim. This claim for refund set forth that the said shares should have been valued at 70% of their market value because of the provisions of the withholding tax, Section 1441 of the Internal Revenue Code of 1954.

Neither in the original return nor in the "amended" return was there included any part of the sum of $4,007.40 which the decedent also had a right to receive on January 1, 1957 under the Provisions of the Incentive Compensation Agreement Plan of The Texas Company. In fact it was not until almost the eve of the trial herein that the petitioner acquiesced in the inclusion of 70% of that amount of $4,007.40. Up to that time not only the petitioner but also the Internal Revenue Service had thought that sum of $4,007.40 represented dividends actually collected by The Texas Company as a custodian on shares of The Texas Company stock held by it for the decedent's account and still due to be delivered to the decedent under that company's Plan. Actually no stock or dividends were ever set aside for decedent under the Incentive Compensation Agreement Plan, nor were they required to be set aside. The Texas Company did not, under said retirement plan, act as a custodian; it simply agreed to deliver to the decedent each year a fixed number of shares and varying sums of money. It was therefore apparent that petitioner's assumption that this amount of $4,007.40 represented funds

collected by The Texas Company and on deposit with a bank by or for the account of the decedent, was incorrect.

Therefore the decedent's right to receive the amount of $4,007.40 which had accrued on January 1, 1957, is includible in the gross estate to the extent of 70% of the amount since 30% had to be deducted and withheld by The Texas Company pursuant to Section 1441 of the Code. The calculation of the refund is as follows:

Taxale Estate as reported on original return	$89,258.65	
Value of Right to Receive the sum of $4,007.40 (Valued at 70% thereof)	2,805.18	
		$92,063.83
Less		
Over valuation of taxable estate	$ 6,662.25	
		$ 6,662.25
Corrected taxable Estate		$85,401.58

Tax having been paid on a taxable estate of $89,258.65, the petitioner is entitled to a refund of $1,079.98, i.e. 28% of the difference between $89,258.65 and $85,401.58.

CONCLUSION

The Tax Court's decision on both points argued above is incorrect and should be reversed.

Respectfully submitted,

FRANK RASHAP,
Ancillary Administrator of the
Estate of Rodolfo Ogarrio
(Daguerre), deceased,
Appearing *Pro Se.*

October, 1963.

APPENDIX

Internal Revenue Code:

Sec. 2105(b). Bank Deposits.—For purposes of this subchapter, any moneys deposited with any person carrying on the banking business, by or for a non-resident not a citizen of the United States who was not engaged in business in the United States at the time of his death shall not be deemed property within the United States."

* * * * * *

Sec. 1441 (1954 Code). (a) GENERAL RULE.—Except as otherwise provided in subsection (c), all persons, in whatever capacity acting (including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States) having the control, receipt, custody, disposal, or payment of any of the items of income specified in subsection (b) (to the extent that any of such items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and composed in whole or in part of non-resident aliens, shall (except in the cases provided for in section 1451 and except as otherwise provided in regulations prescribed by the Secretary or his delegate under section 874) deduct and withhold from such items a tax equal to 30 percent thereof.

* * * * * *

Appendix.

Regulation 20.2031-1(b):

> "Sec. 20.2031-1(b). Valuation of property in general. The value of every item of property includable in a decedent's gross estate under sections 2031 through 2044 is its fair market value at the time of the decedent's death, * * *. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."

BRIEF FOR THE RESPONDENT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,112

ESTATE OF RODOLFO OGARRIO (DAGUERRE), Deceased, FRANK RASHAP, Ancillary Administrator, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition For Review of the Decision of the Tax Court of the United States

---

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STATEMENT OF QUESTIONS PRESENTED

Rodolfo Ogarrio was a nonresident alien and was not engaged in business in the United States when he died in Mexico City in 1957. At that time he was owed money by his New York stockbroker as a result of a recent sale of securities and also was owed stock and money by his former employer in the United States under a pension plan. In the opinion of respondent, for purposes of determining the amounts of the decedent's estate subject to United States estate tax, the questions are:

1. Whether the amounts owed to the decedent by his stockbroker at the time of his death qualify for exclusion from his gross estate as "moneys deposited with any person carrying on the banking business, by or for" decedent under Section 2105 of the Internal Revenue Code of 1954.

2. Whether stock and money owed to decedent by his former employer are includible in his gross estate only after diminution on account of the 30 percent withholding for income taxes for which provision is made in Section 1441 of the 1954 Code.

INDEX

CITATIONS

Cases:

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,112

ESTATE OF RODOLFO OGARRIO (DAGUERRE), Deceased, FRANK RASHAP, Ancillary Administrator, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition For Review of the Decision of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

COUNTER-STATEMENT OF CASE

Taxpayer is the Estate of Rodolfo Ogarrio, who died in Mexico City in January, 1957. The decedent had been an employee of The Texas Company, a Delaware corporation, for many years prior to his retirement in December, 1950. At the time of his death he was and for a number of years had been

a nonresident alien, not a citizen of the United States. He was not then engaged in business in the United States. (JA 17a-18a, 55a.)

The decedent was a customer of Bache & Company at the time of his death and for many months previously. Bache was a New York stock brokerage house which was a member of the New York Stock Exchange and of the Stock Clearing Corporation in New York City. The decedent had a "cash account" with Bache. A "cash account" with a stock brokerage house is one where the customer agrees that any purchases made by the broker for his account will be paid for in full by the customer in cash upon receipt of the securities by the broker, and any sales made by the broker for the customer's account will be paid for in full in cash to the broker for the customer's account at the time of delivery by the broker of the customer's securities. (JA 18a, 55a-56a.)

Prior to January 10, 1957, Bache had received 3,936 shares of The Texas Company for the decedent's account. The certificates were in his name and were held by Bache in safekeeping for him pending instructions from him regarding sale or other disposition of the stock. These certificates were kept by Bache together with whatever other certificates of The Texas Company that Bache held from time to time for other customers. (JA 19a, 56a.)

On January 10, 1957, Bache sold the 3,936 shares of The Texas Company for the decedent's account. The sale was made on the New York Stock Exchange

pursuant to the rules of the Exchange for the total net amount of $235,599.54, after deductions for brokers' commissions and stock transfer taxes. In accordance with the rules of the Exchange, the sale was to be completed by delivery and payment on January 16, 1957, through a clearing house known as Stock Clearing Corporation. (JA 19a, 56a.)

On January 16, 1957, through the Stock Clearing Corporation, Bache delivered for the decedent's account 3,936 shares of The Texas Company to the purchaser to whom they had been sold on January 10, 1957. On the same day, January 16, 1957, through the Stock Clearing Corporation, Bache received payment in the net amount of $235,599.54, after commissions and stock transfer taxes. On January 16, 1957, as a result of offsetting transactions and as a result of securities delivered and securities received, Bache owed on balance to Stock Clearing Corporation the sum of $255,969.72 and actually delivered to Stock Clearing Corporation its check in that amount drawn on Guaranty Trust Company. As a result of this transaction, at the time of his death the decedent no longer owned the 3,936 shares of The Texas Company. At the close of business on January 16, 1957, the regular books of account of Bache & Company showed that $235,599.54 had been credited to the decedent's account on that day as a consequence of the transaction described above. (JA 19a-20a, 56a-57a.)

On January 17, 1957, at about 8:00 A.M., Mexico City time, equivalent to 9:00 A.M., Eastern Standard

Time, Rodolfo Ogarrio (Daguerre) died in Mexico City. (JA 17a, 55a.)

On January 17, 1957, and subsequent to 9:00 A.M., Eastern Standard Time, Bache delivered to the Hanover Bank in New York City a check in the amount of $257,350.53 drawn on its checking account in the Hanover Bank and payable to the order of the Hanover Bank for the account of decedent. This check included the sum of $235,599.54 received by Bache on January 16, 1957, through the Stock Clearing Corporation. (JA 20a, 57a.)

Apart from the agreement establishing the decedent's "cash account" with Bache (JA 29a), there was no other agreement between them (JA 44a, 57a). Bache had no fiduciary relationship to the decedent in respect of the proceeds of sale of his securities. Its responsibilities were to credit decedent's account with the proceeds and to pay him that amount upon receiving instructions from him. In the absence of such instructions, it was Bache's practice to hold the credit balance in the account and send out a statement monthly pending instructions. (JA 44a-46a, 57a-58a.) In fact Bache did not segregate for the decedent any funds which it had received through the clearing house procedures before paying such funds over to or on behalf of the decedent. Bache was under no obligation to make any such segregation. (JA 46a, 57a.) On January 17, 1957, Bache could have used its Hanover Bank account for any partnership purpose rather than pay its debt to decedent. It could have made payment to decedent by

drawing on its account in at least several other banks. Also, Bache could have paid decedent out of any funds owned or controlled by it, regardless of whether such funds were on deposit in any bank. (JA 46a-47a, 48a, 57a.)

At the close of business on January 16, 1957, Bache had sufficient funds on deposit in various banks to pay all checks issued on or before January 16, 1957, including the check drawn to the order of decedent dated January 17, 1957, in the sum of $257,350.53. (JA 31a, 50a, 58a.) On the indicated dates Bache had on deposit in various banks in New York City the following amounts of money (JA 31a-32a, 52a, 58a):

January 15, 1957	$2,259,671.58
January 16, 1957	2,290,153.42
January 17, 1957	2,852,140.95

However, on January 16, 1957, Bache did not have sufficient funds on deposit to pay all credit balances outstanding in customers' accounts if all of its customers had made demand on that date for immediate payment. This financial condition was in keeping with governing regulations which permitted Bache to have debts, including customers' balances, totaling up to twenty times its capital. (JA 31a, 51a, 58a.)

On January 1, 1957, under the terms of an employees' retirement plan of The Texas Company, decedent, as a former employee of that company, became entitled to receive 376 shares of the common stock of The Texas Company and the sum of $4,007.40 in cash. Because decedent was a nonresident alien, un-

der Section 1441 of the Internal Revenue Code of 1954, The Texas Company was required to deduct and withhold a tax of thirty percent of the value of this stock and money before it could be turned over to decedent. The market value of the stock on the date of decedent's death was $21,949. The Company was required to deduct and withhold $6,662.25 from the stock and $1,202.22 out of the sum of $4,007.40. (JA 20a-21a, 58a-59a.)

At the time of decedent's death, on January 17, 1957, no part of the 376 shares of stock and no part of the sum of $4,007.40 had been delivered or paid over by The Texas Company to or for the account of decedent. No part of the United States income taxes required to be deducted and withheld had been paid to the Internal Revenue Service by The Texas Company or by decedent or by others on his behalf. (JA 21a-22a, 59a.)

The Commissioner included in decedent's taxable estate the sums of $21,949 and $4,007.40. The taxpayer filed an amended nonresident alien estate tax return and stated that the value of the 376 shares at the date of decedent's death was $15,286.75 which is $21,949 minus $6,662.25, the sum required to be deducted and withheld by The Texas Company. (JA 21a, 59a.)

In deficiency proceedings the Tax Court sustained the Commissioner's determination that amounts which his stockbroker owed to decedent at the time of his death were not excludable from his gross estate as "bank deposits" under Section 2105 of the 1954 Code.

(JA 59a-60a.) Also, the Tax Court held that Section 2053(c)(1)(B) of the 1954 Code expressly prohibits the deduction from the gross estate of income taxes in respect of the stocks and cash which the taxpayer received from The Texas Company under its pension plan, since these items of income were received after decedent's death. (JA 63a-64a.)

STATUTES INVOLVED

These are set forth in the Appendix, *infra*.

SUMMARY OF ARGUMENT

This case concerns the application of the United States estate tax laws to property situated in the United States and belonging to a nonresident alien decedent not engaged in business in the United States at the time of his death in Mexico. Taxpayer claims the benefit of the "bank deposits" exclusion of Section 2105(b) of the 1954 Code with respect to some of his property in the United States and contends that the amount of other property subject to tax is limited by income tax withholding requirements. These contentions were rejected by the Tax Court for reasons set forth in its opinion, and we submit that this Court should affirm for those same reasons.

1. Under Sections 2101-2106 of the 1954 Code, the estate of a nonresident alien decedent is subject to tax on certain property situated in the United States at the time of his death. Section 2105(b) provides that for purposes of this tax property within the United States does not include "any moneys deposited

with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in a business in the United States at the time of his death". The purpose of this exclusion was to aid United States banks in competing with foreign financial institutions for deposits of nonresident aliens. Neither the terms of the exclusion nor its purpose is applicable to this case.

Here the decedent had instructed Bache & Company, a New York stockbroker, to sell certain securities for him. Bache made the sale on the New York Stock Exchange on January 10, 1957, and under the rules of the Exchange it was completed on January 16, 1957. Bache delivered the shares and received payment through Stock Clearing Corporation procedures. Because of offsetting transactions Bache did not receive cash from the clearing house that day but delivered its own check in a substantial amount. Decedent died in Mexico City at about 9:00 A.M., Eastern Standard Time, on January 17, 1957. Bache deposited an amount which included the proceeds of sale of decedent's stock in the Hanover Bank in New York for the decedent's account on January 17, 1957, sometime after 9:00 A.M.

Bache & Company is not a bank and taxpayer cannot be given the benefit of the "bank deposits" exclusion on the basis of a credit in his account with the stockbroker at the time of his death. The deposit by Bache to decedent's account in the Hanover Bank was made after decedent's death, and Section 2105(b) authorizes the exclusion only where the bank deposits

exist at the time of death. On the facts of this case the bank accounts of Bache & Company may not properly be attributed to the decedent at the time of his death. No deposit in any Bache bank account was made by the decedent and up to the time of his death no such deposit had been made specifically for him. The proceeds of sale of decedent's stock cannot be traced into any Bache bank account, and no bank account of the broker was particularly referrable to the decedent at the time of his death. Moreover, even if a tracing were possible, it is plain that the "bank deposits" exclusion would not apply in this case. That exclusion has been held inapplicable to deposits in which the decedent's rights were hedged with restrictions under a trust instrument. *A fortiori*, the exclusion cannot properly apply here, for the bank accounts in which taxpayer claims an interest were owned and controlled by Bache & Company for its own account.

2. Taxpayer further contends that the entire amount of certain shares of stock and cash which his former employer owed to decedent at the time of his death should not be included in the taxable estate. Taxpayer contends that the former employer was required to withhold 30 percent of this property for income taxes. However, Section 2053(c)(1)(B) of the 1954 Code expressly provides that income taxes on income received after the death of a decedent are not deductible for estate tax purposes. Since the stock and cash in question was paid after decedent's death, the deduction claimed on behalf of his estate is expressly prohibited by the 1954 Code.

ARGUMENT

I

The Debt Owed By Bache & Company To The Decedent On The Date Of His Death Was Not a Bank Deposit By Or For The Decendent and Is Therefore Not Excludible From His Gross Estate In The United States Subject To Estate Tax

Section 2101 of the Internal Revenue Code of 1954 imposes a tax upon the transfer of the "taxable estate" of every decedent nonresident who is not a citizen of the United States. Under Section 2103 the tax applies only to that part of the nonresident alien decedent's estate "which at the time of his death is situated in the United States". Section 2105, Appendix, *infra*, further provides that property within the United States does not include proceeds of insurance on the life of a nonresident alien or "any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in a business in the United States at the time of his death". In the present case the opinion of the Tax Court, written by Judge Raum, shows that the amount owed to the decedent by Bache & Company on the date of his death was not a bank deposit by or for the decedent. The amount of this debt was property within the United States on the date of the decedent's death; neither the bank deposits exclusion upon which taxpayer relies nor any of the other deductions, credits or exclusions set forth in Sections 2101-2106 applies; consequently, the decedent's property in issue is subject to tax under Section 2101.

The bank deposit and insurance proceeds exclusion from the estate tax with respect to nonresident alien decedents was added to the tax law in the Revenue Act of 1921.[1] The legislation was designed to aid United States insurance companies and banking businesses in competing with foreign companies, and this purpose is expressly stated in the Senate Finance Committee Report on the 1921 bill.[2] The Statement of Dr. T. S. Adams, Tax Advisor to the Treasury Department, before the Senate Finance Committee in 1921 contains the same limited interpretation of the

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[1] Section 403(b), Revenue Act of 1921, c. 136, 42 Stat. 227, states:

> The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of this title, be deemed property within the United States.

[2] S. Rep. No. 275, 67th Cong., 1st Sess., p. 25 (1939-1 Cum. Bull. (Part 2) 181, 199) states:

> Section 403(b)(3). Under existing law the proceeds of insurance upon the life of a nonresident decedent, where the insurer is a domestic company, is deemed property within the United States. This has been found to place American insurance companies at a disadvantage in competing with foreign companies, and, in order to remedy this situation, the proposed bill expressly states that such insurance shall not be regarded as property situated in the United States. A like provision is made respecting moneys deposited with any person carrying on a banking business, by or for a nonresident decedent who is not engaged in business in the United States at the time of his death.

scope of these special exclusions.[3] With respect to bank deposits, in *City Bank Farmers Trust Co.* v. *Pedrick*, 168 F. 2d 618, 619 (C.A. 2d), certiorari denied, 335 U.S. 898, Judge Learned Hand noted that the purpose of the exclusion "was indeed to encourage the maintenance by aliens of bank deposits in our banks", but also suggested that the intention

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[3] Dr. Adams testified as follows (Senate Hearings on Internal Revenue, September 15, 1921 (confidential Committee Print, subsequently released for publication), p. 287):

> Dr. Adams. * * *
>
> The next is on page 148, line 5. You have two House amendments here. One of them relates to insurance and exempts insurance taken out in American companies by nonresident aliens. A man in Canada, for instance, takes out insurance in an American company. That is now subject to tax. It is proposed to exempt that.
>
> Senator La Follette. Why?
>
> Dr. Adams. On the ground that there is no real situs here. It is likely to kill American insurance in foreign countries.
>
> Senator Dillingham. It does not amount to very much, does it?
>
> Dr. Adams. It is trivial.
>
> Secondly, the House has also granted a deduction on any monies deposited in any bank, banking institution, or trust company in the United States by or for a nonresident decedent who was not engaged in business in the United States at the time of his death. It has, in the House bill, been exempted. In any event, it is proposed to make that same change. After the words "bank, baking institution, or trust company" insert "bankers," so that it may also happen if it is on deposit with J. P. Morgan, Kuhn, Loeb & Co., or a private banker.
>
> The Chairman. Very well; go to the next point.

was only to exempt "ordinary bank accounts subject to withdrawal by cheque, of which the public often speaks as 'cash in bank' and regards much as it does currency". There is no legislative authority for expanding the bank deposits exclusion to ordinary commercial or personal credits or to funds held by any persons except a banking organization or to deposits made after the death of the nonresident decedent. The terms and legislative history of Section 2105 of the 1954 Code preclude interpretation of the provision as more than a very limited restriction of the estate tax on property situated in the United States and belonging to a nonresident alien decedent at the time of his death.

In the present case, decedent's property situated in the United States at the time of his death plainly was not within the bank deposit exclusion. On January 10, 1957, Bache & Company had sold for decedent's account 3,936 shares of The Texas Company stock for a net price of $235,599.54. The sale was made on the New York Stock Exchange, and under Exchange rules the sale was completed on January 16, 1957. On that date Bache delivered the shares sold and received payment through the procedures of the Stock Clearing Corporation. On January 16, 1957, as a result of offsetting transactions, Bache owed $255,969.72 to the Stock Clearing Corporation, and it actually delivered to the Clearing House its check in that amount drawn on the Guaranty Trust Company. At the close of business on January 16, 1957, decedent no longer owned the 3,936 shares of The Texas Company, and the books of Bache &

Company showed that $235,599.54 had been credited to decedent's account as a result of the sale transaction. (JA 19a-20a, 56a-57a.) These were the circumstances at the time of decedent's death in Mexico City at 9:00 A.M., Eastern Standard Time, on January 17, 1957; he had sold his stock and owned a recognized debt due from the brokerage firm of Bache & Company but not yet paid.

In the court below the representative of decedent's estate did not contend that Bache & Company is a bank (JA 60a) and no such contention has been pressed in this Court. Section 2105(b) applies only to deposits "with any person carrying on the banking business". An amendment to the original bill in 1921 was considered necessary even to make the bank deposits exclusion apply to amounts deposited with private banking houses. (See testimony of Dr. T. S. Adams, fn. 2, *supra.*) The exclusion has been held applicable to deposits in the United States with mutual savings banks (Rev. Rul. 54-623, 1954-2 Cum. Bull. 14) and to deposits with an express company which is authorized to do a banking business and in fact does a banking business (Rev. Rul. 54-114, 1954-1 Cum. Bull. 204). But on the grounds that the depository was not "carrying on the banking business" the exclusion has been held inapplicable to amounts deposited with federal savings and loan associations (Rev. Rul. 54-624, 1954-2 Cum. Bull. 16), or to money held for a nonresident alien decedent by an express company not engaged in the banking business (Rev. Rul. 54-114, 1954-1 Cum. Bull. 204),

or to sums on deposit in an interest bearing demand account with an individual businessman who received deposits only from one person (*Rosenblum* v. *Anglim*, 135 F. 2d 512 (C.A. 9th)). Even where a banking institution was involved, the bank deposits exclusion has been held inapplicable to amounts in a nonresident alien's safe deposit box or to amounts held in a custodian account by a bank acting by the particular agreement only in a fiduciary capacity, since such circumstances do not involve "moneys deposited". Rev. Rul. 55-143, 1955-1 Cum. Bull. 465; G.C.M. 22419, 1940-2 Cum. Bull. 288. Under these rulings, it is clear that an amount left with a stock brokerage house, such as Bache & Company, is not within the exclusion from estate tax for "moneys deposited with any person carrying on the banking business" by or for a nonresident alien decedent not engaged in business in the United States.

On January 17, 1957, after decedent's death at 9:00 A.M., Eastern Standard Time, Bache delivered its check to the Hanover Bank for decedent's account. The check was drawn on Bache's account with the same bank and was in the amount of $257,350.33, including the payment for decedent's Texas Company stock sold the previous day. (JA 20a, 57a.) It is not disputed that if the deposit had been made to the decedent Ogarrio's account at an earlier date—even a day earlier—and had been left on deposit, under Section 2105(b) the estate tax would not apply to the deposit. But Section 2105(b) excludes from tax only bank deposits by or for a nonresident alien decedent

"at the time of his death". As the Tax Court points out (JA 62a), in the statute "Congress has drawn a clear line and * * * this case is on the wrong side of that line". The statute does not provide for an exclusion from the taxable estate for a bank deposit made promptly *after* the death of a nonresident alien decedent, regardless of whether the deposit was made for a business or a tax avoidance purpose.

Taxpayer claims the benefit of the bank deposits exclusion, however, on a theory that bank deposits of Bache & Company should be treated as property of the decedent Ogarrio to the extent of the amount owed to him by Bache from the sale of stock. (Br. 6-25.) Factually, the argument appears to be that Bache & Company was using its own bank accounts to *hold for* the decedent the $235,599.54 it owed him. (See Br. 6-21.) This is quite different from the statutory requirement that the money be "deposited with" the bank "for" the decedent. As legal authority (Br. 22-25), taxpayer relies on cases in which bank deposits were made in the United States by or on behalf of persons who sometimes did not disclose their identity and who were nonresident aliens and subsequently died outside the United States. Many cases arose out of the circumstances just before and during World War II and involved bank accounts set up for persons to whom funds could not be sent under wartime Government regulations. When the alien beneficiaries of such bank accounts died (in concentration camps or elsewhere in occupied Europe or in military service abroad) the bank deposits were held

not subject to United States estate tax. The distinguishing feature of these cases is that in each instance the bank deposit plainly was made *by* the nonresident alien decedent or solely *for* him. See *Estate of Oei Tjong Swan* v. *Commissioner*, 247 F. 2d 144 (C.A. 2d). For example, in *Estate of Weiss* v. *Commissioner*, 6 T.C. 227, bank deposits were excluded from the taxable estate of a nonresident alien decedent, not engaged in business in the United States, on the ground they had been made "for" decedent by his former business partner, as a friend, although the separate account was in the name of the surviving partner and his son. More frequently the depositor in cases of this type has been a trustee formally appointed under a trust instrument.[4] Where the deposit was not made by the decedent and also was not solely "for" him, the bank deposits exclusion has been held inapplicable. *City Bank Farmers Trust Co.* v. *Pedrick*, 168 F. 2d 618 (C.A. 2d); *Estate of Loewenstein* v. *Commissioner*, 17 T.C. 60. In *City*

[4] In addition to *Weiss*, cases in which bank deposits have been made by a person acting as trustee or agent for a nonresident alien decedent and in which the bank deposits for decedent have been excluded from decedent's taxable estate in the United States under Section 2105(b) and its predecessors include: *Bank of New York* v. *United States*, 174 F. Supp. 911 (S.D. N.Y.); *City Bank Farmers Trust Co.* v. *United States*, 174 F. Supp. 583 (S.D. N.Y.); *Estate of Gade* v. *Commissioner*, 10 T.C. 585; *Estate of Davey* v. *Commissioner*, 10 T.C. 515; *Estate of de Eissengarthen* v. *Commissioner*, 10 T.C. 1277; *Estate of de Guebriant* v. *Commissioner*, 14 T.C. 611; *Estate of Bradford-Martin* v. *Commissioner*, 18 T.C. 544; *Estate of Waldstein* v. *Commissioner*, 35 T.C. 156.

Bank Farmers Trust Co. the Second Circuit denied exclusion of amounts from an alien nonresident decedent's estate where the trust instrument provided that a trust payable to specified beneficiaries was revocable only with the consent of the trustee. The court pointed out (p. 620) that there was a "vital difference" between such an arrangement and a bank deposit for the decedent because in case of an attempted revocation—

> there was always the possibility that it [the trustee] might not accede, and that if it did not, even though its refusal was unlawful, the settlor could not withdraw the deposit without resort to negotiation at least, and after that to a court. A deposit so hedged about with restrictions is not properly a bank deposit at all; at least there is no reason to suppose that it is within the scope of § 863(b) [the predecessor of Section 2105(b) of the 1954 Code].

Undisputed facts establish that Bache did not make any deposit in any bank expressly "for" Ogarrio until the Hanover Bank deposit shortly after Ogarrio's death on January 17, 1957. If that specific deposit of funds in a bank for Ogarrio's account had occurred before his death, of course the bank deposits exclusion of Section 2105(b) would have applied. But such a deposit was not made before decedent's death, and the chronology of events shows that none of Bache's bank accounts is particularly referrable to decedent's claim against Bache. Before January 16, 1957, Bache had made arrangements for the sale of decedent's Texas Company stock on the New York

Stock Exchange but the sale had not been completed and Bache had not been paid anything with respect to the sale. Therefore, up to January 16, 1957, Ogarrio plainly had not obtained from this transaction any ownership claim or right in any bank account standing in Bache's name. While the stock sale was completed on January 16, 1957, no deposit of proceeds of the sale was made in any Bache bank account on that date. As a result of offsetting transactions on the Exchange on January 16, 1957, Bache paid the Stock Clearing Corporation over $250,000, so the proceeds of the sale of Ogarrio's stock were used by Bache in clearing house payment arrangements and cannot be traced into any Bache bank account. Taxpayer contends (Br. 7) that the sale could have been made only for cash because Ogarrio was a "cash customer" of Bache. But the customer's agreement between Ogarrio and Bache did not require the segregation and delivery of the identical receipts of any security sale.[5] Bache's obligation was only to pay decedent Ogarrio an amount equal to the proceeds of the sale of his securities, and Bache could have made the payment from any funds owned or controlled by it, whether or not those assets were on deposit in any bank or banks. (JA 57a.) Under these circumstances there is no factual basis on which prior to his death decedent could have made a valid

[5] The agreement between decedent and Bache states (JA 29a, par. 3) that Bache "shall at no time be required to deliver to me [Ogarrio] the identical property purchased, held or carried for my account, but only property of like kind and amount".

claim to ownership of any particular bank deposits or other assets of Bache. The cases dealing with specific funds set aside for a nonresident alien in a bank account maintained by or in the name of another person are inapplicable here.

Moreover, the result would be the same even if the proceeds of decedent's stock sale could be traced into a Bache bank account from which payment ultimately was made. In *City Bank Farmers Trust Co.* v. *Pedrick, supra,* p. 620, the Second Circuit held that a deposit "hedged about with restrictions is not properly a bank deposit at all" and at least is not a deposit of the type which should be excluded from a decedent's taxable estate under Section 2105(b). Also in *Estate of Loewenstein* v. *Commissioner,* 17 T.C. 60, the holding was that particular trust funds deposited by the trustee in a bank were not excluded from decedent's estate. The Tax Court stated (p. 63) "the cases all seem to be in agreement that funds held in an active trust for the benefit of the nonresident alien are not 'monies deposited * * * by or for him' within the meaning of section 863(b) [2105(b) of the 1954 Code]". Certainly the restrictions on any right decedent might have claimed in Bache bank accounts, even in case of a tracing, would have been far greater than the trust restrictions which made the bank deposits exclusion inappropriate in the *City Bank Farmers Trust Co.* and *Loewenstein* cases. There can be no question on this record that on January 16, 1957, Bache & Company controlled its bank accounts, particularly its account in the Han-

over Bank. It could have used those accounts for any partnership purpose. (JA 57a.) [6] Also, on the date of decedent's death, the total of Bache's obligations to its customers far exceeded its total bank accounts. (JA 50a-52a, 58a.) This financial condition was permitted by governmental and stock exchange regulations allowing a brokerage firm to have debts up to twenty times capital. (JA 51a, 58a.) But this circumstance is not consistent with the concept of a customer tracing proceeds of sale of his securities into a particular brokerage firm bank account and claiming that an amount in that account is held "for" him for some indefinite period. Under the *City Bank Farmers Trust Co.* case, if the rights of a decedent are "hedged about with restrictions"—even relatively minor restrictions upon funds admittedly held in trust for the decedent—Section 2105(b) does not exclude the funds from decedent's estate. Here it is plain that decedent did not have any ownership or control of any Bache bank account and would not have had any such right on the date of his death even if he had been able to trace proceeds from his account to a particular bank account. *A fortiori*, the doctrine stated in *City Bank Farmers Trust Co.* precludes considering any Bache bank ac-

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[6] The evidence is that the choice of bank from which payment is made on a security sale depends upon the administrative convenience to Bache. Where a deposit has been made as a result of stock transactions for the day, payment to persons who sold stocks that day would not necessarily be made from the bank in which the deposit was made on that day. (JA 47a.)

count as a bank deposit by or for the decedent at the time of his death.

Granting taxpayer the benefits of Section 2105(b) would not serve the purpose for which the legislation was enacted. That purpose, discussed above, was to encourage ordinary bank deposits by aliens in United States banks. In the present case there is no contention that the alien decedent himself made any bank deposit. Taxpayer claims a benefit with respect to bank accounts maintained by and in the name of Bache & Company, a New York stock brokerage firm. The fact that the funds in issue were on deposit in banks in the United States was entirely the choice and doing of Bache. It is apparent, far more clearly here than in the *City Bank Farmers Trust Co.* case, that the bank accounts in question are not the kind of bank deposits which the statute was enacted to encourage.

Estate of Worthington v. *Commissioner*, 18 T.C. 796, upon which taxpayer relies (Br. 22-23), does not support his position. That case decided that the alien decedent had an unconditioned right to funds on deposit with two New York banks at the time of her death, and therefore that these amounts were excluded from her taxable estate in the United States. The funds in the bank accounts were derived from securities transactions of decedent's grandfather's estate, and the accounts were in the name of a brokerage house which bore the name of the executor of that estate. The Tax Court opinion in the *Worthington* case is directed entirely to a decision that the

decedent had an unconditional right to the funds, and does not even consider whether the bank accounts themselves properly could be attributed to the decedent if she had a direct claim against the owner. Also, as the Tax Court points out (JA 62a-63a), the *Worthington* case is distinguishable because that case involved deposits in two specific banks and also because there was no finding, as in this case, that the total amount of the depositor's obligations exceeded the amounts on deposit. The apparently close relationship between the stock brokerage firm in the *Worthington* case (Goodbody & Company) and the executor (Marcus Goodbody) from whom decedent was unconditionally entitled to receive the bank deposits, also differentiates that case. The Tax Court correctly held (JA 63a) that its own prior decision under such different circumstances is not controlling.

Van Alen v. *American National Bank*, 52 N.Y. 1, and similar cases discussed by taxpayer (Br. 12-18) involve the tracing of funds through agents in various circumstances but do not affect the merits in the present case. Van Alen had delivered to his agents certain bonds and authorized their sale and deposit of the proceeds in the agents' bank account. After depositing the bond proceeds in a bank with some of their own funds, the agents sent Van Alen a check for the proceeds, and the bank refused to honor the check. The New York Court of Appeals held (p. 4) that the case was governed by the principal "that so long as money or property belonging to the principal or the proceeds thereof may be traced and distin-

guished in the hands of the agent or his representatives or assignees, the principal is entitled to recover it unless it has been transferred for value without notice". Accordingly, Van Alen was allowed recovery of the proceeds of sale of his bonds which had been placed in a bank account for him and for which he had been given a check. The case, decided in 1873, involves a specific tracing of funds into a particular bank account. There were no conflicting claims to the funds, and there was no possibility of multiple demands on the bank account. The present case differs from *Van Alen* in each of these respects. Moreover, while Van Alen's agents issued their check to him prior to his claim against the bank, Bache did not write a check to decedent until January 17, 1957. On January 16, 1957, Bache, not the decedent, owned its Hanover Bank account and all of its other bank deposits.

II

The Stock and Money Owed To Decedent By His Former Employer Are Includible In His Gross Estate Without Diminution For Income Taxes

At the time of decedent's death his former employer, The Texas Company, owed him 376 shares of its common stock and $4,007.40 in cash under an employees' retirement plan. The 376 shares had a fair market value of $21,949 at that time. It is undisputed that the stock and cash would have constituted income to the decedent, Mr. Ogarrio, when received. (JA 20a-21a, 39a-40a, 58a, 63a.) Under

Section 1441 of the 1954 Code, The Texas Company was required to withhold a tax equal to 30 percent of the cash and stock value. At the time of Ogarrio's death no shares or cash had been delivered or paid to him by The Texas Company and no part of the federal income taxes required to be deducted and withheld had been paid to the Internal Revenue Servic by the company or decedent or anyone on his behalf. (JA 21a-22a, 59a.)

Taxpayer contends that because of the 30 percent withholding requirement only 70 percent of the stock and money due from The Texas Company should be included in his taxable estate. The Tax Court rejected this contention as inconsistent with specific Code provisions. (JA 63a.)

Section 2053 of the 1954 Code, Appendix, *infra*, which specifies deductions from a gross estate allowed in determining the value of a taxable estate, is made applicable to the estates of nonresident aliens by Section 2106, Appendix, *infra*. Section 2053(c)(1)(B) states that "Any income taxes on income received after the death of the decedent * * * shall not be deductible under this section". Since it is unquestioned that the income in issue was received after decedent's death (JA 40a-41a), the quoted provision is directly applicable and precludes deduction of income taxes from decedent's estate. The prohibition of Section 2053(c)(1)(B) is not, of course, avoided by taxpayer's treatment of the withholding tax as a reduction in, rather than a deduction from, the decedent's gross estate. As the Tax Court stated

(JA 64a), "the same result" cannot be obtained "by shrinking the amounts includable in the gross estate in the first instance".

CONCLUSION

For the reasons set forth above, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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NOVEMBER, 1963.

APPENDIX

Internal Revenue Code of 1954:

SEC. 2053. EXPENSES, INDEBTEDNESS, AND TAXES.

(a) *General Rule.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

(1) for funeral expenses,
(2) for administration expenses,
(3) for claims against the estate, and
(4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, in included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

* * * *

(c) *Limitations.*—

(1) *Limitations applicable to subsections (a) and (b).*—

* * * *

(B) *Certain taxes.*—Any income taxes on income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance

taxes, shall not be deductible under this section.

* * * *

(26 U.S.C. 1958 ed., Sec. 2053.)

SEC. 2105. PROPERTY WITHOUT THE UNITED STATES.

(a) *Proceeds of Life Insurance.*—For purposes of this subchapter, the amount receivable as insurance on the life of a nonresident not a citizen of the United States shall not be deemed property within the United States.

(b) *Bank Deposits.*—For purposes of this subchapter, any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death shall not be deemed property within the United States.

(c) *Works of Art on Loan for Exhibition.*—For purposes of this subchapter, works of art owned by a nonresident not a citizen of the United States shall not be deemed property within the United States if such works of art are—

(1) imported into the United States solely for exhibition purposes,

(2) loaned for such purposes, to a public gallery or museum, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and

(3) at the time of the death of the owner, on exhibition, or en route to or from

exhibition, in such a public gallery or museum.

(26 U.S.C. 1958 ed., Sec. 2105.)

SEC. 2106. TAXABLE ESTATE.

(a) *Definition of Taxable Estate.*—For purposes of the tax imposed by section 2101, the value of the taxable estate of every decedent nonresident not a citizen of the United States shall be determined by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

(1) *Expenses, losses, indebtedness, and taxes.*—That proporation of the deductions specified in sections 2053 and 2054 (other than the deductions described in the following sentence) which the value of such part bears to the value of his entire gross estate, wherever situated. * * *

* * * *

(26 U.S.C. 1958 ed., Sec. 2106.)

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REPLY BRIEF OF THE PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,112

ESTATE OF RODOLFO OGARRIO (DAGUERRE), Deceased,
FRANK RASHAP, Ancillary Administrator, PETITIONER,

v

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

On Petition for Review of the Decision of the Tax Court of the United States

FRANK RASHAP, Esq.,
Ancillary Administrator,
Appearing Pro Se,
74 Trinity Place,
New York, New York.

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CITATIONS

ARGUMENT

I

The sum of $235,599.54, the proceeds of the sale of the 3,936 shares of The Texas Company, were in the bank accounts of Bache & Company for the decedent and belonged to the decedent prior to the decedent's death.

On January 16, 1957, the day before the decedent died. Bache & Company, as brokers for the decedent, delivered and received payment for 3936 shares of The Texas Company in the sum of $235,599.54 which sum was in the bank accounts of Bache & Company *for* the decedent.

The chronological order of events with respect to the sale of the aforesaid shares of stock of The Texas Company and the receipt of payment therefor are:

(a) Prior to January 10, 1957 Bache & Company had received 3936 shares of The Texas Company for the decedent's account and the decedent had a "cash account" with Bache & Company.

(b) On January 10, 1957, Bache sold the 3936 shares of The Texas Company for the decedent's account on the New York Stock Exchange.

(c) In accordance with the rules of the New York Stock Exchange, the sale was to be completed by delivery and payment on January 16, 1957, through the Stock Clearing Corporation.

(d) On January 16, 1957, through the Stock Clearing Corporation, Bache delivered for the decedent's account 3936 shares of The Texas Company to the purchaser to whom they had been sold on January 10, 1957.

(e) On the same day, January 16, 1957, through the Stock Clearing Corporation, Bache received pay-

ment in the net amount of $235,599.54, after commissions and stock transfer taxes.

(f) On January 16, 1957, the books of account of Bache & Company showed an entry that $235,599.54 had been credited to decedent's cash account on that day as a consequence of the transaction described above.

(g) On January 17, 1957, on or about 9 A. M. Eastern Standard Time, the decedent died in Mexico City.

(h) On January 17, 1957, and subsequent to 9 A. M. Eastern Standard Time, Bache & Company delivered to Hanover Bank in New York City, where the decedent maintained a checking account with said bank, a check in the amount of $257,350.53 drawn on its checking account in the same bank, which sum included the sum of $235,599.54 received by Bache on January 16, 1957, through the Stock Clearing Corporation.

It is petitioner's contention that Bache & Company, having received the sum of $235,599.54 on January 16, 1957, prior to the death of the decedent and having made an entry on its books of account in the cash account of the decedent, showing a credit to the account of the decedent for this sum, that this sum which was in the bank accounts of Bache & Company was being held in such bank accounts *for* the decedent and therefore this sum is exempt from the United States estate tax since the decedent was a nonresident not a citizen of the United States not doing business in the United States at the time of his death.

In *Century Indemnity Company* v. the *State of Maryland*, 144 F. Supp. 671, involving moneys held by a broker, it was determined that such moneys belonged to the principal and are held by his agent, the broker, as trustee. While this involved a real estate transaction, the principle of law is the same.

> "[4] There is no single beneficiary of the trust in such a deposit. If the title of the seller is defective, the purchaser is entitled to receive his money back; he has a contingent beneficial interest in the deposit. But, if the title is good and the sale is consummated, the deposit belongs to the seller, who has acknowledged receipt of it in the contract of sale. *It is his money, held by his agent as trustee.*"

Petitioner contends that there was no need and no requirement of segregation of the proceeds of the sale by Bache & Company in their bank accounts. The respondent does not deny that payment was received by Bache & Company prior to the death of the decedent and the entry crediting decedent's cash account for the proceeds of this sale was likewise made prior to the death of the decedent. The relationship between Bache and the decedent was not that of debtor and creditor, but of principal and agent, and as a matter of law the proceeds of the sale were held by Bache & Company in their bank accounts for the decedent as trustees.

II

The purpose of the statute exempting from estate taxes any moneys deposited in a bank by or for a non-resident alien not engaging in business in the United States will not be defeated by exempting the proceeds of the sale from estate taxes.

The respondent relies heavily on *City Bank Farmers Trust Co.* v. *Pedrick*, 168 F. 2d 618. In that case, the bank account which was a trust account was restrictive in its nature since it gave the trustee various rights in the management of the trust fund and the Court held that a deposit so hedged about with restrictions is not properly a bank deposit at all and refused to exempt it under Section 863(b) of the Internal Revenue Code. In the instant

case, however, there are no restrictions. Bache & Company received payment in cash through the Stock Clearing Corporation for the proceeds of the sale of the stock and the cash was in the bank account of Bache & Company and belonged to the decedent prior to his death, so that it is our considered opinion that *City Bank Farmers Trust Co.* v. *Pedrick* is not decisive here.

In *City Bank Farmers Trust Co.* v. *United States*, 174 F. Supp. 583 (June 1959), the Court stated:

> "There is but one question presented, namely, whether section 863(b) of the Internal Revenue Code, 26 U.S.C.A. section 863(b), applied at the time of the death of the decedent to the moneys on deposit in the income account of this trust. This section then read:
>
> 'Sec. 863. Property without the United States.
>
> 'The following items shall not, for the purpose of this subchapter, be deemed property within the United States:
>
> • • • • •
>
> '(b) Bank deposits.—Any moneys deposited with any person, carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death.'
>
> • • • • •
>
> "The income balance shall not be deemed property within the United States if it constitutes moneys deposited with a person carrying on the banking business '*by or for*' the decedent (section 863 I.R.C.). The meaning of the alternative 'by or for' was considered in Estate of, Oei Tjong Swan v. Commissioner, 247 F. 144, at page 148, where the Court of Appeals for the Second Circuit held as follows:
>
> 'The statute, however, uses the words "by" and "for" in the alternative. The plain meaning of this

usage seems to us to be that when money is deposited either by a non-resident for the benefit of himself or a third person, or by a third person for the benefit of a non-resident, exemption is available if all the other requirements are satisfied.' "

The Court further stated at page 586:

"We considered this precise point in Bank of New York, Trustee (Mary Viva Brooke) v. United States, D. C., 174 F. Supp. 911, at page 917, and concluded:

' * * * that the accumulated income in the hands of the trustee should be excluded from the taxable estate.

' * * *

'This accumulated income was not "hedged about with restrictions"; the decedent could withdraw it any time she elected so to do "without resort to negotiation at least, and after that to a court"; and it is this which makes "the vital difference" and brings this fund within the exemption granted by the statute (quotations from L. Hand, J., in City Bank Farmers Trust Co. v. Pedrick, 2 Cir., 1948, 168 F. 2d 618, 620 (48-I USTC Par. 10, 622)).'

"There were no restrictions under the terms of the trust instrument on the income account of the Pineyro trust; the entire net income of the trust belonged to the decedent and as each item of income was deposited in the income account it was deposited for the account of the income beneficiary and for no one else."

In the *Estate of Oei Tjong Swan, Oei Ing Tjhing* v. *Commissioner of Internal Revenue*, 247 F. 2d 144, the Court, in reversing a decision of the Tax Court and in construing the words "by" and "for" stated:

"[4] The statute, however, uses the words 'by' and 'for' in the alternative. The plain meaning of this

usage seems to us to be that when money is deposited either by a non-resident for the benefit of himself or a third person, or by a third person for the benefit of a non-resident, exemption is available if all the other requirements are satisfied.

"[5] This plain meaning is reinforced by the policy underlying the exemption which was and is to encourage non-residents to use American banks as depositories for their funds by assuring them that such funds would not be taxed merely because technically present in this country. See H. R. Rep. No. 1432, 67th Cong., 1st Sess. 25 (1921). Denying the exemption to a non-resident depositor does more violence to this policy than denying the exemption to a non-resident beneficiary, to whom the Tax Court would restrict the exemption, since it is the depositor who decides whether or not to deposit the funds in an American rather than a foreign bank, and he would probably be deterred more by a tax on himself than on the beneficiary.

"• • •

"City Bank Farmers Trust Co. v. Pedrick, 2 Cir., 1948, 168 F. 2d 618, relied on by the Tax Court and the Commissioner, is not relevant for in that case the deposit was not by the non-resident decedent but by a resident trustee. See D.C.S.D.N.Y. 1947, 69 F. Supp. 517, 518.

"[6] Finally, although as a general rule exemptions and deductions are to be strictly construed, that general rule of construction must bow to clear statutory language and policy. Thus our language in City Bank Farmers Trust Co. v. Pedrick, 68 F. 2d at page 619, that 'as an exemption section we look at • • • [section 863(b)] jealously,' has no application in this context where both language and policy clearly indicate a generous construction. Trotter v. Tennessee, 1933, 290 U. S. 354, 356, 54 S. Ct. 138, 78 L. Ed. 358."

Thus it is clear that the purpose of the statute was to encourage non-resident aliens to deposit funds with banks in the United States and to stimulate such business, the non-resident alien was assured that the funds so on deposit would not be taxed to his estate.

We must emphasize that the decedent had a bank account with the Hanover Bank at the time of his death and that the check from Bache & Company representing the proceeds of the sale of The Texas Company stock in the sum of $235,599.54 was actually deposited in said bank account, even though such deposit was made an hour or two after the decedent actually died on the morning of January 17, 1957.

Although the Commissioner contends that Section 863(b) is an exemption statute and as such should be strictly construed, that rule of statutory construction is subordinate to the paramount rule that the Congressional purpose and intent as gleaned from the statute and it legislative history must be given effect. In *Trotter* v. *Tennessee,* 290 U. S. 354 (1933), the Supreme Court stated the rule as follows, at page 356:

> "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. *On the* other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers. (Italics supplied.)"

The expressed purpose of the legislature in enacting this section is concisely and definitively stated as follows in H. Rept. 1432, 67th Cong., 1st Sess. (1921) at page 25:

> "Under existing law the proceeds of insurance upon the life of a domestic decedent, where the insurer is a domestic company, is deemed property within the United States. This has been found to place American insurance companies at a disadvantage in competing with foreign companies, and, in order to remedy this

stituation, the proposed bill expressly states that such insurance shall not be regarded as property situated in the United States."

Thus, it is clear that the purpose of the statute was to encourage non-resident aliens to deposit funds with banks in the United States and to stimulate such business, the non-resident alien was assured that the funds so on deposit would not be taxed to his estate. Funds so deposited would stimulate American business regardless of whether the bank deposit was in the name of the non-resident alien or in a revocable trust created by him.

The Tax Court has itself on several occasions expressly noted that a strict and narrow interpretation of this section would be contrary to the expressed intention of Congress. For example, in *Estate of Karl Weiss*, 6 T. C. 227 (1946), money belonging to the decedent was deposited by a friend in an American bank in the latter's own name. In overruling the respondent's contention that the amount of this deposit was not exempt under Section 863(b), the Court stated as follows at page 229:

> "*The words used must be given their normal meaning, since no reason appears for giving them any special or restricted meaning.* Congress did not describe the deposit as one in the name of the decedent or one made directly by him, nor did it mention a direct contractual relationship between him and the bank. If it had intended to limit the application of the section, as contended for by the respondent, it could have found better words to convey that thought. (Italics supplied.)"

See, also *Estate of F. Herman Gade*, 10 T. C. 585 (1948), where the Court in holding that the exemption afforded by Section 863(b) was applicable said at page 588:

> "The legislative purpose, as manifested when the provision was adopted, was to place American banks

in a competitive position with those abroad in their activities carried on for foreigners. S. Rept. 275, 67th Cong., 1st Sess. page 25.

"* * * If foreign investors are deterred from placing funds in bank accounts by the fear that the property will be subjected to estate tax in the United States, the effect would presumably be similarly adverse in respect of funds suubject to dcedent's order but growing out of arrangements calling for custody or management.

"Only by attributing to the word 'deposit' a narrow and technical meaning entirely at variance with the remaining language of the section and with its declared spirit is there ground for denying the claimed exclusion. Nothing in the authorities to which we have been referred appears to call for any such treatment."

While it is true that this was not a deposit made *by* the non-resident alien actually the proceeds were being held in the bank account of Bache & Company *for* the alien.

Judge Raum in the Court below made the following observation:

"Although it might be tempting to stretch the statute to provide an exemption from tax that seems so tantalizingly close, the fact is that Congress has drawn a clear line and that this case is on the wrong side of that line."

This observation by Judge Raum should be considered in the light of the purpose and meaning of the exemption statute referred to above. A more generous construction should have been made by Judge Raum and on this appeal we ask the Court to do so.

It is respectfully submitted that it would be extremely unfair under the circumstances set forth above to tax the proceeds of the sale of The Texas Company stock which

the respondent has admitted were in the bank accounts of Bache & Cohpany and which we contend were held "for" the decedent in said bank accounts as part of the decedent's estate.

III

The value of decedent's right at the time of his death to receive under the Incentive Compensation Agreement of The Texas Company 376 shares of the common stock of The Texas Company and the sum of $4,007.40 which right accrued on January 1, 1957 was the total sum of $18,091.43.

We have covered this point in our main brief and will not burden the Court with a reiteration of the same, except to state that as of January 1, 1957 the decedent, a non-resident alien, was entitled to this cash and stock, even though it had not been delivered or paid over to him because of the withholding provisions of the Internal Revenue Code of 1954. Therefore, Section 2053(c) relied upon by the Commissioner is inapplicable.

CONCLUSION

It is respectfully submitted that the decision of the Tax Court should be reversed.

Respectfully submitted,

FRANK RASHAP,
Ancillary Administrator of the
Estate of Rodolfo Ogarrio
(Daguerre), deceased,
Appearing *Pro Se.*

November, 1963.